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MEMORANDUM.

On Thursday, December 10, 1936, *His Majesty* EDWARD THE EIGHTH *abdicated the Throne and His Royal Highness* ALBERT FREDERICK ARTHUR GEORGE, DUKE OF YORK, *was thereupon proclaimed King by the title of* GEORGE THE SIXTH.

JUDGES, LAW OFFICERS, ETC.

MEMORANDA.

1937.

Jan. 18. *This day* THE RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C., *Editor of the "Law Reports,"* 1895–1935, *died in London, aged* 91.

Feb. 6. THE RIGHT HON. HUGH PATTISON, BARON MACMILLAN, *received the honour of G.C.V.O.*

Feb. 13. *This day* THE HON. JOHN STEPHEN CURLEWIS, *Chief Justice of South Africa, was, by His Majesty's Command, appointed a member of His Majesty's Most Honourable Privy Council.*

Mar. 4. GAVIN TURNBULL SIMONDS, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of* MR. JUSTICE HARRY TRELAWNEY EVE, *resigned, and was afterwards Knighted.*

Mar. 18. *This day* SIR HARRY TRELAWNEY EVE, *lately a Judge of His Majesty's High Court of Justice, Chancery Division, was, by His Majesty's Command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

Apr. 27. THE RIGHT HON. ROBERT ALDERSON, BARON WRIGHT, *Master of the Rolls, was appointed to be a Lord of Appeal in Ordinary under the provisions of the Appellate Jurisdiction Act,* 1876, *in succession to* THE RIGHT HON. LORD BLANESBURGH, *resigned.*

Apr. 27. THE RIGHT HON. SIR WILFRID ARTHUR GREENE, KNIGHT, O.B.E., *one of the Lords Justices of Appeal, was appointed to be Keeper or Master of the Rolls and Records of the Chancery of England in the place of* THE RIGHT HON. LORD WRIGHT.

Apr. 27. SIR FRANK DOUGLAS MACKINNON, KNIGHT, *one of the Justices of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal in the place of* THE RIGHT HON. SIR WILFRID ARTHUR GREENE.

May 6. THE HON. MR. JUSTICE FINLAY, K.B.E., *was nominated to be ex-officio Commissioner for England under the Railway and Canal Traffic Act,* 1888.

May 11. THE RIGHT HON. SIR MICHAEL MYERS, K.C.M.G., *Chief Justice of New Zealand, received the Honour of G.C.M.G.*

May 11. JOHN BENNETT, ESQ., *Vice-Chancellor of the County Palatine of Lancaster, was Knighted.*

May 11. THE RIGHT HON. SIR JOHN ALLSEBROOK SIMON, G.C.S.I., K.C.V.O., O.B.E., K.C., M.P., *received the Honour of G.C.V.O.*

June 1. FREDERICK JOHN WROTTESLEY, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards Knighted.*

June 3. THE RIGHT HON. SIR WILFRID ARTHUR GREENE, *Master of the Rolls, and* THE RIGHT HON. ROBERT ALDERSON, BARON WRIGHT, *were appointed to be Chairman and Member respectively of the Royal Commission on Historical Manuscripts.*

June 8. *This day* SIR FRANK DOUGLAS MACKINNON, *Lord Justice of Appeal,* SIR THOMAS GARDNER HORRIDGE *and* SIR GEORGE JOHN TALBOT, *lately Justices of His Majesty's High Court of Justice, King's Bench Division, were, by His Majesty's Command, sworn of His Majesty's Most Honourable Privy Council, and took their places at the Board accordingly.*

June 28. *This day* THE RIGHT HON. THOMAS, BARON CRAIGMYLE, *sometime a Lord of Appeal in Ordinary, died at a Nursing Home in Glasgow, aged* 87.

July 29. *The King was pleased by Letters Patent under the Great Seal bearing date July* 23, 1937, *to appoint* THE RIGHT HON. EDWARD FREDERICK LINDLEY, VISCOUNT HALIFAX, K.G., G.C.S.I., G.C.I.E., *Lord President of the Council,* THE RIGHT HON. RICHARD WILLIAM ALAN, EARL OF ONSLOW, O.B.E., *Chairman of Committees of the House of Lords,* THE RIGHT HON. GORDON, BARON HEWART, *Lord Chief Justice of England,* THE RIGHT HON. SIR WILFRID ARTHUR GREENE, KNIGHT, O.B.E., *Master of the Rolls,* THE RIGHT HON. SIR FRANK BOYD MERRIMAN, KNIGHT, O.B.E., *President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, to be Commissioners for the care and custody of the Great Seal of the Realm during any absence of* THE RIGHT HON. DOUGLAS MCGAREL, VISCOUNT HAILSHAM, *Lord High Chancellor of Great Britain, from the United Kingdom.*

Oct. 19. *This day* THE HON. SIR RIGBY PHILIP WATSON SWIFT, *one of the Justices of His Majesty's High Court of Justice, King's Bench Division, died at his home, Kiona, Crowborough, Sussex, aged* 63.

Oct. 26. *This day* THE RIGHT HON. THOMAS ROLLS, BARON WARRINGTON OF CLIFFE, *sometime a Lord of Appeal in Ordinary, died at his residence, Clyffe Hall, Market Lavington, Wilts, aged* 86.

Oct. 26. FREDERICK JAMES TUCKER, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of* THE HON. MR. JUSTICE SWIFT, *deceased, and was afterwards Knighted.*

ERRATA.

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BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (E.)*
1936
Feb. 11.

TRADE INDEMNITY COMPANY, LIMITED . . . . APPELLANTS;

AND

WORKINGTON HARBOUR AND DOCK BOARD . . . . RESPONDENTS.

Contract for construction of works—Insurance—Guarantee—Joint bond of guarantor or insurer and principal debtor—Unusual circumstances affecting risk—Non-disclosure—Subsequent dealings between guarantor or insurer and principal debtor.

A Harbour and Dock Board, having resolved to enlarge their dock, invited tenders for the work from numerous contractors, informing them where the contract for the work might be inspected and instructing them that they must make local and independent inquiries as to the nature of the surface, strata, soil and sub-soil or ground to be excavated, and the nature and height of the tides, and generally must obtain their own information on all

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* *Present:* Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, and Lord Roche.

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matters affecting the construction, completion and maintenance of the works, and as to all matters which might influence them in making their tender and fixing the rates and prices therein, and that the Board would not be responsible for any information the contractors might obtain except such as was given in reply to a written inquiry addressed to the clerk or manager of the Board. Of several tenders received that of a company, K. & R., Ld., was by far the lowest. The Board informed K. & R., Ld., that they were not prepared to accept that tender unless K. & R., Ld., procured a guarantee to the amount of 50,000*l*. for the due performance of the contract. In compliance with this demand K. & R., Ld., procured a joint and several bond from an insurance company whereby that company and K. & R., Ld., jointly and severally bound themselves to the Board for the due performance of the contract by K. & R., Ld. The Board accepted this guarantee, and K. & R., Ld., entered upon the work in pursuance of the contract, which made the final certificate of the Board's engineers final and binding between the parties.

In the course of the work the contractors encountered an unexpected quantity of water in the soil, and the expense of pumping was such that they could not continue the work without further funds. Thereupon the Board advanced them two sums of 20,000*l*. and 25,000*l*. to be repaid upon certain terms; but, notwithstanding these loans, the contractors failed to complete the contract and went into liquidation, and the Board's engineers made a final certificate showing over 78,000*l*. due from the contractors to the Board. This sum included so much of the 45,000*l*. lent to the contractors as remained unpaid at the date of their default. The Board sued the insurance company on the joint bond:—

Held, (1.) that the bond was a contract of guarantee and not a contract of insurance;

(2.) On the facts, that there was no such misrepresentation or non-disclosure of material facts by the Board as to invalidate the bond.

Judgment of the trial judge reversed; judgment of the Court of Appeal affirmed, on this point.

(3.) That the loans of 20,000*l*. and 25,000*l*. being outside and independent of the contract, the amount due thereon ought not to have been included in the engineers' final certificate; that inasmuch as the amount due and unpaid on the loans was unascertained, the amount due on the bond being equally undefined, the Board could not recover upon it.

Order of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal dated October 4, 1934, as amended by a further order of that Court dated December 3, 1934.

The Workington Harbour and Dock Board had resolved to construct an enlarged dock at Workington, an undertaking

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which involved considerable excavation of ground below the level of high tide and between the existing dock and the sea. Tenders for the work were invited from well known contractors on plans and specifications prepared by Messrs. Rendel Palmer & Tritton, an eminent firm of engineers. With the invitations in each case was sent a document containing the following "Instructions to persons tendering":—

"1. The drawings, specification, and all other contract documents can be inspected by persons tendering on application at the Harbour Office, Workington, Cumberland, and on production of the invitation to tender. Uncoloured blue line prints of any of the drawings Nos. 2 to 48 may be obtained from Messrs. Robert J. Cook & Hammond, 47 and 49 Tothill Street, Broadway, Westminster, S.W.1, on production of the invitation to tender and payment of the cost which will not exceed 2*s.* 6*d.* per sheet. A key plan showing the site of the proposed works is attached to the specification.

"2. The Contractor must obtain for himself, on his own responsibility and at his own expense, all the information which may be necessary for the purpose of making a tender and entering into the contract and must examine the General Conditions and Specifications and the above-mentioned documents and inspect and consider the site and surroundings.

"3. The Contractor must also inspect and satisfy himself as to the nature of the existing roads, waterways, railways, sidings and other means of communication and access to and egress from the site and works, the existing railways and sidings on the site and the available accommodation as regards land (whether without or within the site), the facilities for mooring or berthing vessels, and the buildings that may be required for temporary purposes in connection with the construction, completion and maintenance of the works, and must make his own enquiries as to workyard sites and depots and dumps, and as to the acquisition of such additional sites and areas as may be necessary for temporary purposes for constructing, completing and maintaining the works.

"4. He must also, notwithstanding any information given on the drawings, or in the documents herewith, make local and independent enquiries as to the nature of the surface, strata, soil, subsoil and ground to be excavated or built upon or into which piles have to be driven, as to the beds of the sea, river, harbour, dock or channel to be deepened or dredged or in or upon which the works or temporary works have to be constructed, and the nature and height of the tides, and levels and inclinations of the site and the foundations of the several works, and form his own estimate as to the pumping power, temporary works and appliances required to keep free from water from any source any and every part of the works which is or may be required by the engineers to be executed in the dry.

" 5. He must also satisfy himself as to the sources of supply and sufficiency of the different materials referred to in the specification or indicated on the drawings, and as to the provision of water for the works, and must examine and consider all other matters and all possible and probable contingencies and generally must obtain his own information on all matters affecting the construction, completion and maintenance of the works, and as to all matters which may influence him in making his tender and fixing the several rates and prices therein.

" 6. No claim for additional payment beyond the prices or rates in the Schedule of prices, or other the prices or rates to be determined by the engineers as in the General Conditions mentioned, will be entertained, nor shall the Contractor be entitled to make any claim on the ground of any representation, or on the ground that the Contractor was supplied with information or given any promise or guarantee by any person (whether in the employ of the Workington Harbour and Dock Board or not), nor shall any failure on his part to obtain all necessary information for the purpose of making his tender and fixing the several prices and rates therein relieve him from any risks or liabilities in connection with or for the due fulfilment of all his obligations in the contract contained.

" 7. Should there be any doubt or obscurity as to the meaning of any of the contract documents, or as to anything to be done, or not to be done, by the accepted tenderer, or as to these instructions, or as to any other matter or thing, the person tendering must set forth such doubt or obscurity in writing and submit the same to the Clerk and Manager, Workington Harbour and Dock Board, Workington, Cumberland, not later than one week before the date fixed for the delivery of tenders, and except such reply as the Clerk and Manager may in writing give, neither the engineers, nor any member, agent, or servant in their employ, or in the employ of the owners, has any authority to make any representation or explanation to persons tendering, as to the meaning of the Indenture of Contract, General Conditions, Specification, Schedule of Prices, Schedule of Wages and Materials, Day Work Schedule, Drawings or other documents, or as to anything to be done or not to be done by the accepted tenderer for the works, or as to these instructions, or as to any other matter or thing, so as to bind the Workington Harbour and Dock Board or bind or fetter the judgment or discretion of the engineers in the exercise by them of their powers and duties under the contract."

The lowest tender received was that of Messrs. Kirk & Randall, Ld., for 284,119*l.*, the next lowest being some 42,000*l.* more. The Dock Board accepted Messrs. Kirk & Randall's tender on condition that they provided a guarantee of 50,000*l.* for the performance of the contract. In order to comply with this condition Messrs. Kirk & Randall procured the following document dated October 11, 1922, under the seal of the Trade Indemnity Company, Ld.

The effect of this document was a matter in dispute between the parties to the action. The document was in these terms:—

" Amount 50,000*l.*

" Know all men by these presents that Messrs. Kirk & Randall, Ld., of 146/7 Grosvenor Road London S.W.1 (hereinafter called the Contractors) and the Trade Indemnity Company, Ld., of 13 Austin Friars London, E.C. 2, (hereinafter called the Surety) are held and firmly bound unto the Workington Harbour & Dock Board of Workington in the County of Cumberland (hereinafter called the Owners) in the full and just sum of Fifty thousand pounds sterling to the payment of which said sum of money well and truly to be made and done the said Contractors and the said Surety bind themselves and their successors jointly and severally firmly by these presents:

"Signed Sealed and Dated this Eleventh day of October One thousand nine hundred and twenty-two.

"Whereas the Contractors have entered into a certain written contract with the Owners bearing date the [twenty-third] day of October 1922 (hereinafter referred to as the contract) for the execution of certain works of demolition and the construction completion and maintenance of certain new works in the construction completion and maintenance of an extension of the Lonsdale Dock and a new entrance thereto and all other the works in clause 1 of the contract mentioned (all of which works are more particularly shown described or referred to in the contract) subject to and in accordance with the provisions of the said clause 1 which contract with all its provisions covenants conditions and obligations is hereby made a part of the above written Bond to all intents and purposes as though the contract had been incorporated herein Now therefore the condition of the above written Bond is such that if the Contractors shall execute construct and maintain the said recited works subject to and in accordance with the provisions of the said clause 1 of the contract and shall in all things whatsoever observe perform fulfil and keep all and singular the clauses and conditions agreements matters and things which on the part of the Contractors are and ought to be observed performed fulfilled and kept by them according to the contract then the above written Bond shall be null and void otherwise it shall remain in full force and virtue Provided always and it is hereby agreed and declared that the Surety shall not be released or discharged from the above written Bond by any agreement which may either with or without the assent or notwithstanding the dissent of the Surety be made between the Contractors and the Owners or between the Contractors and the engineers in the contract mentioned for any alteration in or to the said works or the contract or any forbearance by the Owners or by the said engineers whether as to payment time performance or otherwise howsoever or by any dealing or transaction which may take place between the Contractors and the Owners or between the Contractors and the said engineers or by any act or default of the said engineers or by any act or omission to act by the Owners in consequence of the said engineers' acts or defaults and provided further that the Surety shall be bound by all decisions opinions orders directions requisitions and certificates of the engineers under the provisions of clauses 106 and 107 of the contract as the Contractors are so bound."

There followed an arbitration clause upon which no question arose.

On October 23, 1922, the contract for the construction of the work was signed, sealed and delivered. It contained 112 clauses, of which the following appear to be material:—

"79. No money shall be due or payable to the Contractor unless he produces to the Owners a certificate in writing, signed by the engineers, stating the amount due to him, but subject thereto the Owners will make advances monthly to the Contractor in sums not less than 5000*l.* at the rate of 90 per cent. of the value as certified by the engineers of the work executed and materials delivered on the site for the purpose of the construction of the works, until the balance in hand amounts to the sum of 25,000*l.* (herein referred to as the retention money) after which time all advances will be made on the value of the work subsequently executed as certified by the engineers without the deduction of any further retention money, but the Owners may in their discretion make advances at greater rates, at more frequent intervals, or in smaller sums."

"85. . . . . Upon the certificate of the engineers that the Contractor has made default or is in default in the performance of any of his obligations under the contract . . . . the Owners may, after notice to the Contractor of such certificate having been given, enter upon and take possession of the works, materials, temporary buildings and works and plant and oust the Contractor from the site."

"86, paragraph 6. The value of the works constructed at the date of the entry and taking possession by the Owners and the cost of completing the works or any part thereof and of the labour employed, materials purchased and plant hired or purchased for the purpose under paragraph (3.) and the costs, expenses and sums under paragraph (4.) and the liquidated damages under paragraph (5.) shall be ascertained and determined by the engineers, and their certificate showing the balance due or payable by the Contractor to the Owners or by the Owners to the Contractor shall be final and binding on the Owners and Contractor respectively."

"106. In order to prevent disputes from arising (either before the commencement, during the progress, or after the completion of the works by the Contractor or after exercise by the Owners rightly or wrongly of the powers in clause 85 [giving the Owners power on default by the Contractor to enter upon and take possession of the works] or after the abandonment of the works by the Contractor) as to any and every claim by the Contractor whether arising under or out of the contract or from the breach or alleged breach thereof or in any way incidental thereto or connected therewith or not therein provided for, including without limiting the generality of the foregoing provision questions as to quality, quantity and kinds of materials, labour supervision, workmanship, plant and temporary works, the order of the works, and the several parts thereof, the prescribed or extended times (if any) for completion of the works, the liquidated damages for delay or bonus for expedition, the measurement and valuations of the works and materials and of all additional, altered, modified, substituted or omitted work, and certificates of satisfaction and for payment, and as to all other matters and things left to or dependent on the decision, opinion, order, direction, requisition or certificate of the engineers, the engineers' measurement, valuation, decision, opinion, order, direction, requisition or certificate shall be final and binding upon the Contractor and the Owners, and the Owners

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shall not be liable in respect of any claim by the Contractor in respect of any matters or things aforesaid unless and until the liability of the Owners and the amount of their liability in respect of the claim shall have been certified by the engineers whose certificate shall be a condition precedent to any liability of the Owners or to any right of action against the Owners in respect of such claim."

"107. In measuring, valuing, deciding or certifying the engineers are not intended to act as arbitrators but as engineers do by their skill and from their knowledge of any facts and incidents connected with the works, and in so far as the facts are not within their own knowledge the engineers shall be at liberty to inform their minds by enquiring of the resident engineer, inspectors, accountant and others. The engineers shall at all times be considered seised of all the facts necessary for them to form their opinion, make their measurement and valuation, give their decision or order, make their requisition or give or refuse their certificate, and they shall be at liberty to certify at such times and in such manner as in their discretion they shall think proper, and they shall not be bound to give any reason for or any particulars of their certificate or any reason for their not certifying."

In October, 1922, the contractors began work. Early in 1924 they found themselves in financial difficulties and informed the engineers that unless assistance was forthcoming the work could not be continued. Thereupon by an agreement dated April 22, 1924, the Board advanced to the contractors a sum of 20,000*l*. on account of the works the subject of the contract of October 23, 1922, to be repaid by means of a special reduction of 15 per cent. (in addition to the retention money provided for by that contract) from future payments as certified by the engineers, with interest at 5 per cent. on the amount of the advance from time to time unrepaid. In certain events the amount unrepaid with interest was to be paid forthwith. By a further agreement dated October 28, 1925, the Board advanced to the contractors 25,000*l*. upon terms similar to those of the agreement of April 22, 1924. The two sums of 20,000*l*. and 25,000*l*. were advanced with the sanction of the Lords Commissioners of His Majesty's Treasury out of a fund loaned to the Board by the Lords Commissioners under the Trade Facilities Act, 1921.

In or about the month of February, 1926, the contractors made default in carrying on the works within the meaning of clause 85 of the contract of October 23, 1922. The Board then proceeded to complete the works partly themselves and partly by other contractors. On January 8, 1932, their engineers gave a final certificate showing a sum of 78,785*l.* 14*s.* 7*d.* due from the contractors to the Board. In the meantime the contractors had gone into liquidation, and their assets were insufficient to meet the claims of their debenture holders. The sum of 78,785*l.* 14*s.* 7*d.* included an unascertained sum being the balance due in respect of principal and interest under the agreements of April 22, 1924, and October 28, 1925.

On March 4, 1932, the Board issued a specially indorsed writ in the King's Bench Division against the Trade Indemnity Company claiming 50,000*l.* on the contract bond.

The defendants pleaded that the bond was upon its proper construction a contract of insurance. In paras. 5, 6 and 7 of their defence they alleged that the plaintiffs concealed or failed to disclose the following material facts known to the plaintiffs but unknown to the defendants: namely, that— (5 (*a*)) At the site of the works there was an excessive amount of running sand and water; (5 (*b*)) that the contractors had failed to give proper or due consideration to the existence of the running sand and water in calculating the price at which they agreed to execute the works; (5 (*c*)) that the price quoted by the contractors to the plaintiffs for the execution of the works was grossly inadequate, as the plaintiffs well knew, in view of the excessive expenditure which must necessarily be incurred by the contractors in consequence of the running sand and water; (5 (*d*)) that before the contract for the works and before the contract bond had been executed the plaintiffs had warned the contractors that their estimate was too low and had advised them to withdraw their tender.

They further pleaded in para. 8 that the plaintiffs had made divers advances to the contractors amounting to 45,000*l.* without the knowledge or consent of the defendants, and gave as particulars of those advances the two sums of 20,000*l.* and 25,000*l.* lent in accordance with the agreements of April 22, 1924, and October 28, 1925. They counterclaimed for rescission of the bond.

The action was tried before Lawrence J. The learned judge held that the contract bond was a contract of guarantee and not of insurance; but that there had been such non-disclosure by the plaintiffs of material facts as disentitled them to recover. The plaintiffs appealed. The Court of Appeal (Scrutton, Greer and Maugham L.JJ.) held, (1.) that the contract bond was a guarantee; (2.) that there had been no such concealment as to preclude the plaintiffs from recovering; and (3.) that clause 79 of the contract empowered the plaintiffs' engineers to include in their certificate sums advanced in excess of the value of the work done and, presumably, the 20,000*l.* and 25,000*l.* advanced by them to the contractors under the contracts of April 22, 1924, and October 28, 1925. The Court therefore allowed the appeal and ordered judgment to be entered for the plaintiffs.

The defendants appealed to this House.

1935. Dec. 5. *Croom-Johnson K.C.*, *Monckton K.C.*, and *Astell Burt* for the appellants. As to the nature of the contract bond the Court of Appeal were wrong in holding that it was merely a contract of guarantee. Its form, that of a joint bond of the contractors and the appellants, is equivocal and may be disregarded. In substance it is a contract of insurance. In fact the due performance of contracts for construction of works on a large scale is a well known subject of insurance at Lloyd's and other underwriting establishments; and in the present case the transaction was effected through insurance brokers in the City of London: *Smith* v. *Bank of Scotland* (1); *Pidcock* v. *Bishop* (2); *Railton* v. *Matthews* (3); *Hamilton* v.

(1) (1813) 1 Dow, 272, 292, 294.
(2) (1825) 3 B. & C. 605.
(3) (1844) 10 Cl. & F. 934.

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Watson (1); *Willis* v. *Willis* (2); *North British Insurance Co.* v. *Lloyd* (3); *Lee* v. *Jones* (4); *Davies* v. *London and Provincial Marine Insurance Co.* (5); *Dane* v. *Mortgage Insurance Corporation* (6); *Finlay* v. *Mexican Investment Corporation* (7); *Seaton* v. *Heath* (8); *Seaton* v. *Burnand* (9); *Parr's Bank* v. *Albert Mining Syndicate* (10); *Denton's Estate, In re* (11); *American Surety Co. of New York* v. *Wrightson* (12); *Shaw* v. *Royce* (13); *London General Omnibus Co.* v. *Holloway.* (14)

If this is the true view of the contract bond it follows that the respondents owed a duty to the appellants to make a full and faithful disclosure of the facts that the work of construction was an undertaking of exceptional risk involving heavy expenditure owing to the presence of water and running sand in large quantities, that the price quoted by the contractors was unreasonably low, and that they had actually warned the contractors that this was so and had invited them to withdraw their tender.

Secondly, by lending the contractors the two sums of 20,000*l.* and 25,000*l.* during the progress of the works without the knowledge of the appellants, the respondents altered the contract, and so discharged the appellants from liability under the bond. At any rate the engineers' certificate for 78,785*l.* on which the action is founded cannot support a judgment for 50,000*l.*, for 45,000*l.* of which, or so much thereof as remains unrepaid, the appellants were never liable.

Sir William Jowitt K.C., *N. L. Macaskie K.C.*, *Arnold Inman, K.C.*, and *Lawrence Mead* for the respondents. The bond of October 11, 1922, was a contract of guarantee and not in any sense a policy of insurance or a contract of insurance in the nature of a policy. The bond is in the form of a joint contract, as contracts of suretyship very commonly

(1) (1845) 12 Cl. & F. 109.
(2) (1850) 17 Sim. 218.
(3) (1854) 10 Ex. 523.
(4) (1864) 17 C. B. (N. S.) 482, 503.
(5) (1878) 8 Ch. D. 469.
(6) [1894] 1 Q. B. 54.
(7) [1897] 1 Q. B. 517.
(8) [1899] 1 Q. B. 782.
(9) [1900] A. C. 135.
(10) (1900) 5 Com. Cas. 116.
(11) [1904] 2 Ch. 178.
(12) (1910) 103 L. T. 663.
(13) [1911] 1 Ch. 138.
(14) [1912] 2 K. B. 72.

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are, where the debtor and the surety are made joint promisors and were formerly so treated in law, though Courts of equity would take notice of the fact, where it was the fact, that one of the joint promisors was a principal debtor and the other a surety. Then, the bond being a contract of suretyship, it depends on the nature of the transaction whether a fact not disclosed is such that it is impliedly represented not to exist: per Blackburn J. in *Lee* v. *Jones*. (1) In the present case it is clear from the Instructions to persons tendering that those persons were to satisfy themselves as to the nature of the work they were minded to undertake, and that one way, and only one, of eliciting information was open to them—namely, that provided by clause 7 of the Instructions.

The loans of 20,000*l.* and 25,000*l.* did not alter the contract; they were made in order to enable the contractors to carry it out. If the loans had been procured from third persons it could not have been contended that the contract was thereby affected. It is equally immaterial that they were procured from the respondents. Moreover the loans were ineffectual to release the appellants by virtue of the proviso to the bond; they are permitted by the latter words of clause 79 of the contract, and they were covered by the final certificate of the engineers, which by clause 86, para. 6, and clauses 106 and 107 is made final and binding upon the parties.

1936. Jan. 17. The House took time for consideration.

Feb. 11. LORD ATKIN (read by LORD RUSSELL OF KILLOWEN). My Lords, this is an appeal from an order of the Court of Appeal setting aside the order of Lawrence J. at the trial, who gave judgment for the defendants, and directing judgment to be entered for the plaintiffs. The action arises out of a contract dated October 23, 1922, by which a well known firm of contractors, Kirk & Randall, Ld., agreed with the present plaintiffs, the Workington Harbour and Dock Board, to construct a new and enlarged dock at

(1) 17 C. B. (N. S.) 482, 506.

Workington. The Dock Board required a guarantee for the performance of the work, and on October 11, 1922, the defendant company entered into a joint and several money bond in the sum of 50,000*l*. conditioned for the performance by the contractors of their contract. The contractors failed to perform the contract, and the defendants, the Indemnity Company, are now sued on the bond.

Various defences were raised at the hearing which will be discussed in due course. The principal defence which involved a prolonged investigation of facts depended upon allegations of non-disclosure of material facts by the plaintiffs. The judge on this point found for the defendants. He found that the plaintiffs had innocently misled the contractors in respect of a material fact—namely, the amount of water that had to be dealt with by the contractors in course of construction, and that having so misled the contractors they could not enforce the guarantee against the defendants. The Court of Appeal negatived the fact of the misrepresentation and further held that on the terms of the contract, if made, it did not bind the Dock Board. They rejected the plea of non-disclosure; they do not appear to have been in agreement as to whether there exists in general in respect of persons taking a guarantee a duty to disclose material facts which is greater than the duty to disclose in ordinary contracts, but they were all agreed that in the present case there was no duty on the Dock Board to make any such disclosure as the defendants had alleged. I believe that all your Lordships approve the decision of the Court of Appeal on this point, and it will not be necessary to discuss in detail the facts concerning it which are set out in the notable judgment of the late Scrutton L.J., apparently the last judgment which that great judge delivered.

The substance of the case is that the work of constructing the new dock involved considerable excavation of ground between the existing dock and the sea, ground which was below the high tide level. Tenders had been invited from leading contractors on plans and specifications prepared by an eminent firm of engineers, Messrs. Rendel Palmer & Tritton.

The tender of Messrs. Kirk & Randall was the lowest, 284,119*l.*; the next highest tender was 326,223*l.* The instructions to persons tendering made it perfectly plain that the Dock Board threw the whole responsibility upon the contractor for obtaining information as to the nature of the ground and any physical difficulties which he would have to meet. I will not read the whole document but must refer to a few clauses. [His Lordship read clauses 2, 3, 4, 5, 6 and 7 of the Instructions (1), and proceeded :] The ground was in fact waterlogged ; and Sir Frederick Palmer, the head of the firm of engineers, obviously formed the belief that Messrs. Kirk & Randall, whom I will hereafter call the contractors, had underestimated the amount of water with which they would have to contend. He was an acquaintance of one of their directors, and on September 1 he took the unusual course of warning Mr. Duckham, a director of the contractors and their representative on this contract, that their estimate was too low and gave them an opportunity of withdrawing. He indicated pretty plainly that the mistake was in the price for excavating. Mr. Duckham preferred to adhere to his tender. A suggestion was made at the trial that he had been misled by a clerk of the Dock Board as to the flow of water into a trial hole which the Dock Board had caused to be made for the convenience of the persons tendering. It is plain that Mr. Duckham was not entitled to rely upon any such representation even if made and that the clerk had no authority to bind the Dock Board.

The Dock Board, on the advice of the engineers, were only willing to accept the contractor's tender subject to their furnishing a guarantee of 50,000*l.* for the performance of the contract, and on September 6, 1922, wrote to the contractors accepting their tender on that condition. The contractors set about obtaining the required guarantee and eventually arranged with the present defendants to enter into the contract which is the subject matter of this action, and is dated October 11, 1922. Meanwhile the contractors appear to have had misgivings about the water, and on September 20

(1) Ante pp. 3, 4, 5.

wrote to the engineers stating that they had based their estimate on replies to inquiries as to the rate of flow of water in the trial hole; that they were dissatisfied and wished to know the true position. In Mr. Palmer's absence they were invited to meet a Mr. Darling, employed by the engineers as their chief assistant; and accordingly on September 22 there was an interview between Mr. Darling and Mr. Duckham. There was a controversy as to what took place; Mr. Duckham alleging that the information he had received as to the slight flow of water in the trial hole was confirmed, Mr. Darling denying it. The controversy involves the further question whether the trial hole in question was or was not a closed hole at the date of the alleged flow, in which case the flow of water would of course give no information of value. It would merely be the result of leakage. It is on this point that the learned judge found that the contractors had been misled by the engineers. It is unnecessary to consider whether the finding is correct, for it is plain that Mr. Darling had no authority to bind the Dock Board by any representations. The instruction to tenderers made plain that the only means of obtaining binding representations was by written information from the clerk to the Board: see Instructions, clause 7. On Sir Frederick Palmer's return, after an interview between him and Mr. Duckham on October 4, the contractors, at Sir Frederick's suggestion, by a letter of October 5, withdrew their letter of September 20 expressing themselves satisfied by Mr. Darling's statements. At the interview Sir Frederick Palmer again offered to allow the contractors to withdraw their tender, but they declined. On October 11 the defendants entered into the contract in question after making inquiries as to the financial position of the contractors, and on October 23 the contract for the construction of the works was executed.

The first question that arises in regard to the plea of non-disclosure is whether the contract is one of insurance or of guarantee. The form of the contract is a money bond for 50,000*l.* conditioned for the performance by the contractors of the contract in all things whatsoever. The defendants are described in the bond as the "surety": but they say that they are an insurance company; they were approached through insurance agents: this is a well known form of insurance business; and they have reinsured their risks with other persons carrying on business in the insurance world, notably at Lloyd's. On the other hand the contract demanded by the Dock Board was a guarantee; the defendants in the contract style themselves sureties; the contract appears in substance to be a contract to answer for the debt, default or miscarriage of another; and the express provisions negativing release of the "surety" upon a variation of the contract or forbearance as to time indicate that the parties were thinking of the law as to guarantees. I entertain no doubt that this was a guarantee, and the rights of the parties should be regulated on that footing. I may be allowed to remark that it is difficult to understand why business men persist in entering upon considerable obligations in old-fashioned forms of contract which do not adequately express the true transaction. The traditional form of marine policy is perhaps past praying for; but why insurance of credits or contracts, if insurance is intended, or guarantees of the same, if guarantees are intended, should not be expressed in appropriate language, passes comprehension. It is certainly not the fault of lawyers.

We have to decide the case on the footing that the contract sued on was a guarantee. There may be a question whether in the formation of a contract of guarantee there is an obligation on the promisee to make a disclosure of material facts which would not exist in the formation of an ordinary contract. There are decisions in the case of fidelity guarantees: *Railton* v. *Matthews* (1) and *London General Omnibus Co.* v. *Holloway* (2), which would have to be examined if the point arose here for decision. But it is clear that in whatever way any duty to disclose arises and whether the promisee is under a positive duty to disclose material facts, which is one view, or is supposed to represent that the transaction sought to be guaranteed has no unusual or abnormal characteristics, making him the author of a misrepresentation innocent or fraudulent as the case may be, which is another view, the duty or the implied representation will depend upon the particular circumstances of each transaction. In this case the one outstanding feature is that the Dock Board took every care to make it plain that they left it to the proposed contractors to ascertain for themselves all material facts relating to the conditions under which the contract would be performed, and guarded themselves in precise terms against liability for any representations made otherwise than in accordance with clause 7 of the Instructions to tenderers. In short they made it clear that they were a non-disclosing body; and this intimation was plainly made to the defendants, for the relevant documents were incorporated in the contract of guarantee. For myself I doubt on the course of business alone whether a guarantor looks further than the skill and experience of the contractor to guard against risks of unknown difficulties in the performance of such a contract. That seems to accord with the evidence of Mr. Patrick, the manager and contractor of the defendant company. The guarantors are in such a case primarily concerned with the financial ability of the contractors to complete this contract whether it result in a loss or not. On this topic they did in this case make the necessary inquiries. But whatever be the general course of business, in this case, as I have said, the Dock Board have freed themselves from any obligation whether as to disclosure or as to misrepresentations.

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(1) 10 Cl. & F. 934.

(2) [1912] 2 K. B. 72.

I can find no difference in the various facts pleaded as being undisclosed, whether it be the existence of excessive water causing abnormal expenditure (5 (*a*)) or the failure of the contractors to estimate for such abnormal expenditure in fixing the price (5 (*b*)) or the gross inadequacy of the price (5 (*c*)) or the offer by the engineers to release the contractors (5 (*d*)). I think that in the circumstances of this particular case the Dock Board were under no obligation to disclose any of them. I have, I think, made it plain that it has been unnecessary to pass any opinion upon the general law as to disclosure in respect of guarantees, and that this case is decided upon its own facts. I am of opinion that the Court of Appeal was right in concluding that the defence failed on this issue.

There remains, however, a further defence based upon loan transactions which took place unknown to the defendants between the Dock Board and the contractors during the course of the contract. Work was begun in October, 1922: early in 1924 the contractors found themselves in financial difficulties, and acquainted the engineers with the position. Unless some relief were given the work would have been stopped. An arrangement was made by which out of the fund loaned to the Board under the Trade Facilities Act the Board lent to the contractors the sum of 20,000*l.* with interest at 5 per cent. on the terms of a written agreement dated April 22, 1924, the terms of which I must read. [The noble and learned Lord read the agreement of April 22, 1924.] A similar transaction took place on October 28, 1925, by which on the terms of an agreement of that date in similar terms a further advance of 25,000*l.* was made. The only evidence of the sum due from the contractors in respect of which 50,000*l.* was claimed from the defendants was the certificate of the engineers, dated January 8, 1932, certifying that 78,785*l.* 14*s.* 7*d.* was due. It is admitted that this sum includes the balance due upon these loans for principal and interest. How large the balance was was not proved, but it is at least possible that, apart from such balance, the sum due from the contractors would be less than the 50,000*l.* for which the Dock Board have recovered judgment from the defendants. It is said in defence that the defendants never undertook the burden of guaranteeing this payment, and that at any rate to the extent of the unpaid balance of the loan they are under no liability, and as the only proof of the contractors' debt is a certificate which includes an unknown quantum of unpaid loan, there is no proof of the amount of their liability, and that they are entitled to judgment.

The plaintiffs rely upon the terms of the guarantee to meet this defence:—

1. They say that these loans were merely advances made

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under clause 79 of the contract, which provides that no money shall be due or payable to the contractor except under the signed certificate of the engineer but "subject thereto the owners will make advances monthly to the contractor in sums not less than 5000*l.* at the rate of 90 per cent."—the 10 per cent. deduction to make up a retention sum of 25,000*l.* —"after which time all advances will be made on the value of the work as certified . . . . but the owners may in their discretion make advances at greater rates, at more frequent intervals or in smaller sums."

My Lords, this contention, which found favour with the Court of Appeal, appears to me quite untenable. The clause provides for payments to the contractor not as loans but as part payments of the price, the payments are to be made on the engineers' certificates of work done, and the discretion to pay at greater rates means at greater rates than 90 per cent. of the value of the work certified. How that claim can be applied to loans of 20,000*l.* and 25,000*l.* on which interest is charged without any certificate such as is contemplated in the clause I cannot see.

2. It was further said that the claim was covered by the words in the guarantee "provided further that the surety shall be bound by all decisions opinions orders directions requisitions and/or certificates of the said engineers under the provisions of clauses 106 and 107 of the contract as the contractors are so bound." I agree with Maugham L.J. that this must mean "bound under the provisions of clauses 106 and 107, as the contractors are bound, by all decisions, etc., of the said engineer." But when clause 106 is examined it will be found to relate solely to claims by the contractor. The clause reads : "Claims by the contractor . . . . including questions as to the quality etc. of materials . . . . and as to all other matters and things left to or dependent on the decision etc. of the engineers." The clause begins with claims by the contractors, it ends with claims by the contractors, and I cannot think that the words relied on by the Dock Board "as to all other matters and things left to the decision of the engineers" can naturally be construed as containing

a reference to claims by either the contractors or the owners, a construction which grammatically would be distorted. The words referring to "liquidated damages for delay," which were relied on, appear to be quite inconclusive. They occur in the section of the clause which beyond all controversy relates solely to claims by contractors; and they appear to me to refer to disputes raised by contractors objecting to their claims being reduced by sums claimed contra for liquidated damages. Whether the person preparing the contract intended the clause to refer to both parties I do not know, but looking at the contract as a whole I can only say that it would not surprise me to find that only the contractor was intended to be bound. In any event that seems to me to be the true meaning of the words used.

3. It was then said by the respondents that though the loans and the certificate could not be justified under the original contract yet the proviso to the condition of the Bond expressly preserves the liability of the surety. I will read it. [His Lordship read the proviso to the Bond, and proceeded :] The words "any arrangement . . . . for any alteration in or to the said works or the contract" are very wide. Probably they would have to be cut down so as not to include such changes as have been suggested as substituting a cathedral for a dock, or the construction of a dock elsewhere, or possibly such an enlargement of the works as would double the financial liability. An author of great authority, happily still with us, suggests that such words only relate to alterations "within the general purview of the original guarantee." (1) But in my opinion the loan contracts were not alterations of the original contract at all. The contract was for the construction of specified works at specified prices. The loans were independent borrowings to enable the contractors to perform the construction contract. The position is in my opinion just the same as if the contractors had borrowed the money from their bank, or directly from the Trade Facilities Board, and had charged their payments under certificate with repayment by proportionate deductions.

(1) Rowlatt on Principal and Surety, 2nd ed. (1926), p. 118.

The loans were, of course, connected with the contract and were made for the purpose of performing the contract. That does not make them alterations of the contract. It is true that the terms of repayment involve an alteration in the deductions agreed in the contract the terms of which are altered in this respect; and the proviso would prevent the guarantors from relying on any such alteration. But this is a form of repayment the opportunity for which is long past; and in my opinion it has no effect in altering the primary obligation which arises out of an independent contract which the guarantors never undertook should be performed. Similarly as between the contractors and the Dock Board the contractors agreed that the ultimate balance of the loans should be included in the cost of completing the work and so in the certificate to be given on that footing by the engineer. But in my opinion the guarantors are no more affected by this than they would be if the parties had entered into another and additional construction contract elsewhere and agreed that the liabilities under both should be pooled and expressed in one certificate under the first contract. I think that the guarantors never came under any obligation in respect of the new and uncontemplated burden of loans for 45,000*l.*, and are not liable for any sum in respect of such sums or interest.

I should mention one further contention which assumes that the loans are outside the contract. It is said that even if that be so the engineer purported to certify under the contract under clause 86, para. 6; and that the contractors, and therefore the guarantors, must accept the certificate as final even if it included mistakenly items which were not due under the contract. They cited cases where the architect had included in his final certificate sums in respect of extras which had not been ordered in writing in conformity with the contract: *Goodyear and Another* v. *Mayor, &c., of Weymouth and Melcombe Regis* (1); *Laidlaw* v. *Hastings Pier* (2); and *Lapthorn* v. *St. Aubyn.* (3) Those cases, which turn upon the extent to which the parties had entrusted the architect with determining the sums due under the contract, including extras contemplated by the contract, seem to me to have no bearing upon a case where the architect has intentionally included sums which, as I have said, never were or were contemplated to be within the original contract, and over which he only derived certifying authority, if any, from a new and independent contract.

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(1) (1865) 35 L. J. (C. P.) 12.
(2) (1874) 2 Hudson on Building Contracts, 4th ed. (1914), p. 13.
(3) (1885) Cab. & E. 486.

The result is that the only evidence of default by the contractors under the original contract is the non-payment of a certificate which, if binding upon the contractors at all, is only binding by reason of the additional and independent loan contract, and is not binding at all upon the guarantors, for it includes sums to an unknown amount which are not due on the original contract. Whether the certificate is sufficient to establish a breach of the condition of the Bond by the contractors it is not necessary to determine. The plaintiffs, having assigned a breach, have to prove the damages that flow from it. If the certificate had been unimpeachable no question would arise as to the defendants' liability for 50,000*l.* So if it were severable and proof were given of a certificate valid as to an amount due under the original contract. But no such evidence was given in the present case. The amount of the balance of loans and interest may reduce the defendants' liability to less than 50,000*l.*, and in the absence of any evidence as to what the true amount of the liability is the case against them fails, and they are entitled to judgment.

There can be no doubt, however, that the main contest in this case upon which no doubt the bulk of the costs has been incurred was upon the issue of non-disclosure upon which the defendants fail.

I think that as the judgment of the trial judge would have to be extensively altered, the better course would be to order that the appeal be allowed and that the order dated January 11, 1934, and the orders of the Court of Appeal of December 3, 1934, be set aside and that judgment be entered for the defendants on the claim with costs in this

House and in the Courts below: and for the plaintiffs on the counterclaim with costs: the defendants to have no costs of the issues raised by paras. 5 to 7 of the defence: the plaintiffs to have their costs of these issues in the action and on appeal to the Court of Appeal and this House; with a set-off.

LORD RUSSELL OF KILLOWEN. My Lords, I am authorized by my noble and learned friend Lord Thankerton to say that he concurs in the opinion of my noble and learned friend Lord Atkin which I have just read. For myself, I also concur therein, and have nothing to add.

LORD MACMILLAN. My Lords, I have had the advantage of considering in print the opinion of my noble and learned friend Lord Atkin, which has just been read, and I find myself in entire agreement with it in every respect.

LORD ROCHE. My Lords, I concur. On the main point I agree so entirely with the reasoning of my noble and learned friend Lord Atkin that I have nothing to add save that I should like to be permitted also to express my admiration for the masterly treatment of this complicated case to be found in the judgment of the late Scrutton L.J. On the point of the scope of the guarantee sued upon and the sufficiency of the evidence to support the present action, the contention of the plaintiffs which was dealt with as their third contention by my noble and learned friend Lord Atkin has given me much anxiety. There seems to me to be considerable force in the contention that the loan agreements were not more than alterations of the original contract as in effect providing for payment of the contract price pro tanto in advance of work to be done in place of payment on the basis of actual progress made with the work. But in the light of the opinions to the contrary expressed by your Lordships, I am unable to say that I am satisfied with the correctness of this view of the position, and I therefore concur in the motion that the appeal should be allowed and judgment in this action should be entered for the defendants. It is no doubt regrettable that, in default of some agreement on the figures between the parties, further litigation to establish the amount of the defendants' liability under the original contract will be necessary; but at least the parties have the satisfaction of knowing that the main point of controversy between them, that is to say the disclosure point, has now been finally disposed of.

Orders of the Court of Appeal dated October 4 *and December* 3, 1934, *respectively complained of, reversed. Order of Lawrence J. dated January* 11, 1934, *discharged. Ordered that judgment be entered for the Appellants on the claim, and for the Respondents on the counterclaim. Further ordered that the Respondents do pay the Appellants the costs incurred by them in respect of the claim in the Courts below and in this House. Further ordered that no costs be allowed to the Appellants in the Courts below or in this House in respect of the issues raised in paras.* 5, 6 *and* 7 *of the Defence. Further ordered that the Appellants do pay to the Respondents the costs incurred by them in the Courts below and in this House in respect of the counterclaim and in respect of the issues raised by the said paras.* 5, 6 *and* 7 *of the defence, such costs to be set off against the costs payable to the Appellants. Further ordered that the Cause be remitted back to the King's Bench Division of the High Court of Justice, to do therein as shall be just and consistent with this judgment.*

Lords' Journals, Feb. 11, 1936.

Solicitors for appellants: *Wedlake, Letts & Birds.*

Solicitors for respondents: *Johnson, Weatherall, Sturt & Hardy.*

[HOUSE OF LORDS.]

H. L. (E.)*
1936
March 27.

COMMISSIONERS OF INLAND REVENUE . . . . APPELLANTS;

AND

ETHEL MACLEAN CROSSMAN, DOUGLAS CROSSMAN AND CHARLES MATTHEW CROSSMAN RESPONDENTS.

COMMISSIONERS OF INLAND REVENUE . . . . APPELLANTS;

AND

SIR EDWARD MANN, BT., EDWARD JOHN MANN AND HARRY ALLEN BLOCK . . . . RESPONDENTS.

Revenue—Estate Duty—Property passing on death—Shares in company—Restrictions on alienation and transfer—Value of property—Sale "in open market"—Trust companies—Special demand—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7, *sub-s.* 5.

By s. 7, sub-s. 5, of the Finance Act, 1894, "the principal value of any property," which passes on the death of a person dying after the commencement of Part I of the Act, "shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased.". . . .

A testator at the time of his death was entitled to a number of ordinary shares of 100*l.* each in a company the articles of association of which imposed rigid restrictions upon the alienation and transfer of the shares in the Company :—

Held, by Viscount Hailsham L.C., Lord Blanesburgh and Lord Roche (Lord Russell of Killowen and Lord Macmillan dissenting), that the value of the shares for the purpose of estate duty was to be estimated at the price which they would fetch if sold in the open market on the terms that the purchaser should be entitled to be registered and to be regarded as the holder of the shares, and should take and hold them subject to the provisions of the articles of association, including those relating to the alienation and transfer of shares in the company.

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* *Present :* VISCOUNT HAILSHAM L.C., LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD ROCHE.

Attorney-General for Ireland v. *Jameson* [1905] 2 I. R. 218, and *Salvesen's Trustees* v. *Commissioners of Inland Revenue* 1930 S. L. T. 387, approved.

Decision of the majority of the Court of Appeal [1935] 1 K. B. 26, reversed.

There was evidence that the value of the shares in the open market would be enhanced if Trust Companies were to be included among possible competitors in the open market.

Held, that the value of the shares should not be appreciated by reason of the special value of the shares to such companies.

Appeals from orders of the Court of Appeal (1) allowing appeals from decisions of the Commissioners of Inland Revenue upon petitions under s. 10 of the Finance Act, 1894.

COMMISSIONERS OF INLAND REVENUE *v.* CROSSMAN AND OTHERS.

The petitioners in this case were the legal personal representatives of Percy Crossman, who died on August 17, 1929, and whose will was proved on November 19, 1929.

The deceased was at the time of his death the holder of 1000 ordinary shares of 100*l.* each in the capital of Mann, Crossman & Paulin, Ld., a company which carried on the business of brewers at the Albion Brewery, Whitechapel, London.

That Company was incorporated on October 10, 1901, under the Companies Acts, 1862 to 1900, as a company limited by shares. Its nominal capital was 2,250,000*l.* divided into 10,000 ordinary shares of 100*l.* each and 125,000 5 per cent. cumulative preference shares of 10*l.* each. All the shares, ordinary and preference alike, were issued and paid up or credited as paid up in full.

The ordinary shares were held almost entirely by members of a small number of families.

By clause 34 of the articles of association of the Company rigorous restrictions were imposed upon the transfer of shares. Clause 34 is set out in full in the judgment of the Lord Chancellor. To state its effect shortly, it enabled a male holder to transfer his shares or appoint them by will to sons or brothers or sons of sons or of brothers subject to the transferees or

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(1) [1935] 1 K. B. 26.

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appointees attaining the age of twenty-five years and being in other respects duly qualified in the opinion of the directors; subject thereto, the article gave the other holders of ordinary shares a right of pre-emption over the shares of living members and an option to purchase the shares of deceased members in each case at a price equal to the par value of the shares plus a proportion of the reserve fund, undivided profits and accruing profits of the Company; and the article contained a general power to the directors to refuse the registration of any transfer where they were of opinion that a proposed transferee was not a desirable person to be admitted to membership, and that without being obliged to assign any reason for their opinion.

By his will the deceased, in pursuance of the limited powers of testamentary disposition permitted by art. 34, specifically disposed of all his ordinary shares.

At the death of the deceased the price of an ordinary share of the Company ascertained as directed by clause 14*a* of art. 34 was 221*l.* 4*s.* 5*d.*, and estate duty was paid on that basis.

COMMISSIONERS OF INLAND REVENUE *v.* SIR EDWARD MANN AND OTHERS.

The petitioners in this case were the executors of Sir William Thomas Paulin, who died on February 26, 1931, and whose will was proved on June 6, 1931.

The testator at the time of his death was the holder of 1600 ordinary shares of 100*l.* in the capital of the aforesaid Company. By his will he specifically bequeathed 500 of his ordinary shares to each of his two daughters, and these shares were duly transferred in compliance with art. 34 of the Company's articles of association and in accordance with the will. The remaining 600 ordinary shares formed part of the testator's residuary estate. Transfer notices were served on the Company in accordance with clause 14 of art. 34; the Company found purchasing members for the 600 shares, and they were duly transferred to these purchasing members.

At the death of the deceased the price of an ordinary share of the Company ascertained as directed by art. 34 was 209*l.* 13*s.* 8*d.*, and estate duty was paid on that basis.

The Commissioners of Inland Revenue declined to accept the valuation of 221*l.* 4*s.* 5*d.* in the first case and 209*l.* 13*s.* 8*d.* in the second case, and insisted that the value of each ordinary share was 475*l.* in each case.

The two petitions were heard by Finlay J.

Two questions were raised before the learned judge: (1.) Whether *Attorney-General for Ireland* v. *Jameson* (1) was rightly decided; (2.) Whether a Trust Company might be included in the class of possible purchasers of the shares "in the open market" within the meaning of those words in s. 7, sub-s. 5, of the Finance Act, 1894. The learned judge followed *Attorney-General for Ireland* v. *Jameson* (1) and fixed the value of the shares at 355*l.* per share in the first case and 351*l.* in the second case. If a Trust Company was to be included among the possible purchasers, he assessed the values at 395*l.* and 391*l.* respectively.

The petitioners in each case appealed to the Court of Appeal. In each case there was a cross-appeal by the Commissioners of Inland Revenue who insisted that the value of the shares should be 395*l.* and 391*l.* respectively. Slesser and Romer L.JJ. (Lord Hanworth M.R. dissenting) upheld the valuations of the petitioners and allowed the appeals and dismissed the cross-appeals.

The Commissioners of Inland Revenue appealed to this House.

1936. January 24. *Sir Thomas Inskip A.-G., Sir Donald Somervell S.-G.,* and *J. H. Stamp* for the appellants in both cases.

By s. 7, sub-s. 5, of the Finance Act, 1894: "The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased.". . . . Take the case of Sir William Paulin's estate as analogous to that of Mr. Percy Crossman also. At his

(1) [1905] 2 I. R. 218.

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death the testator was in full possession and enjoyment of shares in the Company. That was the property which passed on his death. That unrestricted interest in possession is the property the price of which in the open market is to be estimated as the principal value of the property passing on his death. While he lived he was in unrestricted possession of it. If he had attempted to dispose of it, no doubt his power of disposition would have been fettered by restrictions; but he never attempted to dispose of it and the property in his hands was free from any restriction. That unrestricted property passed on his death, and the principal value of that property in unrestricted possession "shall be estimated to be the price which . . . . such property"—i.e., property in unrestricted possession—"would fetch if sold in the open market." The purchaser in the open market must be put in the shoes of the deceased shareholder. The respondents would substitute for this measure of value the price which a purchaser subject to all the restrictions of art. 34 would give. That is not the value which is defined by the Finance Act. Restrictions on transfers, options of purchase, and rights of pre-emption over shares in a company given by its articles of association are not an essential part of the property represented by the shares, but are matters of collateral contract affecting only the title to the property. They are analogous to the covenants in a lease which are no part or parcel of the property demised.

The true method of valuation is that laid down by the Court of Appeal in Ireland in the case of *Attorney-General for Ireland* v. *Jameson* (1), where it was held that shares in a company similar in all material respects to Mann, Crossman & Paulin, Ld., were for the purposes of the Finance Act, 1894, s. 7, sub-s. 5, to be treated as if sold in the open market on the terms that the purchaser should be entitled to be registered as the holder of the shares, but should take and hold them subject to the articles of association, including those relating to the alienation and transfer of the shares in the Company. That case was followed in Scotland in *Salvesen's Trustees* v.

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(1) [1905] 2 I. R. 218.

Commissioners of Inland Revenue. (1) It is submitted that it was rightly decided and ought to be affirmed by this House.

January 27. *Gavin Simonds K.C.*, *Cyril Radcliffe K.C.*, and *D. Ll. Jenkins* for the respondents. The argument for the Crown misrepresents the nature of a share in a company. A share is not merely the unconditional right to a sum of money. "A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act, 1862" [now s. 20 of the Companies Act, 1929]. "The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested"—i.e., as a sum of money dealt with in a particular manner by what were called for the purposes of argument executory limitations—" but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount": per Farwell J., *Borland's Trustee* v. *Steel Brothers & Co.* (2) The value of a share in the market must surely be affected by terms and conditions limiting the right to dispose of it. It cannot seriously be argued that a share in Mann, Crossman & Paulin, Ld., as at present constituted, would sell for the same price as it would if the restrictions of art. 34 were removed. Before that price could be obtained it would be necessary to procure some guarantee or other assurance that the purchaser of the share should be placed on the register of shareholders. The difference in value between the share which actually passed on the death of Sir William Paulin and the share which is said to pass on his death is the difference in value between a share with and a share without such a guarantee. It is impossible to treat a share as being an interest in the Company's assets, or an aliquot share in the Company's capital, and to regard the contract arising from and contained in the Company's articles of association as a separate and independent thing. The contract and the rights

(1) 1930 S. L. T. 387.

(2) [1901] 1 Ch. 279, 288.

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and liabilities which flow from it are of the very essence of the share. Therefore when the owner of a share dies, what passes on his death, and what has to be valued for the purpose of estate duty, is nothing more than his rights and liabilities as they existed under the provisions of the Companies Act, 1929, and the constitution of the particular company. In short the appellants would tax him on the footing that they are free to recognize his rights but to ignore his liabilities.

Jan. 30. *Sir Thomas Inskip A.-G.* replied.

The House took time for consideration.

March 27. VISCOUNT HAILSHAM L.C. My Lords, these two appeals involve the same question—namely, what is the proper basis of valuation for purposes of estate duty of shares in a limited company where the right of transfer is restricted by the articles of association. The Company involved in these two cases is named Mann, Crossman & Paulin, Ld. It was incorporated in 1901 to take over and carry on an old family business of brewers. It has a paid up capital of 2,250,000*l.* divided into 125,000 5 per cent. preference shares of 10*l.* each and 10,000 ordinary shares of 100*l.* each. The shares with which we are concerned in these two cases are ordinary shares. The relevant article is in the following terms :—

" Art. 34 (1.) A male holder may at any time transfer any one or more of his said ordinary shares to any of his sons daughters or grandsons (being sons of sons) or brothers or nephews (being sons of brothers) and being of the age of 25 years at the least, and being in other respects in the opinion of the directors duly qualified for membership.

(2.) A male holder may by his will or any codicil thereto appoint any one or more of his ordinary shares to any of his sons daughters or grandsons (being sons of sons) or brothers or nephews (being sons of brothers), and being at the time of his death of the age of 25 years at the least ; and any such appointee shall be entitled to a transfer of the shares from the legal personal representatives of the appointor, provided that the directors within three months after the death of the appointor signify their approval of the transferee.

(3.) A male holder may by his will or any codicil thereto appoint any one or more of his ordinary shares to any of his sons daughters or grandsons (being sons of sons) or brothers or nephews (being sons of brothers) and who may at the time of his death be under the age of 25 years on the footing that the appointment is only to take effect as and when the appointee attains the age of 25 years, and may in like manner make provision as to the application of the interim income arising from such shares for the benefit of the appointor's widow (if any) and any child or children or remoter issue or brother or nephew (being a son of a brother) of the appointor or some or one of them. And in default of and subject to any such provision such interim income shall be applied in such manner as the legal personal representatives of the appointor shall think fit for the benefit of any such persons as aforesaid. Any such appointee shall on attaining the age of 25 years be entitled to a transfer of the shares from the legal personal representatives of the appointor, provided that the directors within three months after he becomes so entitled signify their approval of him as transferee.

(3A.) The ordinary shares held by any person who shall have acquired his holding under sub-cl. (1.), (2.) or (3.) of this clause and (*a*) who has no issue, or (*b*) who dies without having disposed of his ordinary shares pursuant to sub-cl. (2.) or (3.) hereof, may, and in the case of the death of such holder without having disposed thereof shall, be offered to the Company pursuant to the sub-cls. (6.) to (14.) (*c*) hereof inclusive or such of the same sub-clauses as may be applicable. Provided always that in the case of ordinary shares held by any person who shall have acquired his holding under sub-cl. (1.), (2.) or (3.) of this clause, and who is a daughter of any ordinary shareholder such ordinary shares shall be transferable only pursuant to the provisions contained in the said sub-cls. (6.) to (14.) (*c*) or such of them as may be applicable."

Sub-cls. (4.) and (5.) are not relevant.

" (6.) Except where the transfer is made pursuant to paras. 1, 2, 3 or 5 of this clause, a member proposing to transfer any ordinary share (hereinafter called ' the proposing transferor ') shall give notice in writing (hereinafter called ' the transfer notice ') to the Company that he desires to transfer the same. Such notice shall constitute the Company his agent for the sale of the share at par value to any member of the Company holding any ordinary share or ordinary shares.

(7.) The transfer notice may include several ordinary shares, and in such case shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable except with the sanction of the directors.

(8.) If the Company shall, within the space of three months after being served with such notice, find a member holding an ordinary share or ordinary shares willing to purchase the share (hereinafter called ' the purchasing member ') and shall give notice thereof to the proposing transferor, he shall be bound, upon payment of the par value, to transfer the share to the purchasing member.

(9.) In these regulations the par value of any share means a sum equal to the capital paid up thereon.

(10.) If in any case the proposing transferor, after having become bound as aforesaid, makes default in transferring the share, the Company may receive the purchase money and shall thereupon cause the name of the purchasing member to be entered in the register as the holder of the share, and shall hold the purchase money in trust for the proposing transferor.

(11.) The receipt of the Company for the purchase money shall be a good discharge to the purchasing member, and, after his name has been entered in the register, in purported exercise of the aforesaid power, the validity of the proceedings shall not be questioned by any person.

(12.) If the Company shall not, within the space of three months after being served with the transfer notice, find a member holding an ordinary share or ordinary shares willing to purchase the shares and give notice in manner aforesaid, the proposing transferor shall, at any time within three calendar months afterwards, be at liberty (subject to para. 14 hereof) to sell and transfer the shares (or those not placed) to any person and at any price.

(13.) If, and so far as practicable, the shares comprised in a transfer notice shall be offered by the Company to the members holding an ordinary share or ordinary shares in proportion as nearly as may be to the ordinary shares held by them respectively, and any shares not accepted in response to such offer, shall be offered to the remaining said members in the like proportion. Any share which it is impracticable thus to offer, may be offered to such member or members, whether a director or not, as the directors think fit.

(14.) Subject to paras. (2.) and (3.) of this clause the legal personal representatives of a deceased holder of an ordinary share or ordinary shares shall within three calendar months after the death of such holder, serve the Company with a transfer notice in respect of the ordinary share of the deceased, and if default is made in serving such notice within the time aforesaid, the directors shall be at liberty to appoint any person to sign and serve such notice on behalf of the legal personal representatives of the deceased, and a transfer notice signed and served by such person shall be effective.

(14*a*.) Provided nevertheless that where under any of the paras. (6.), (7.) and (14.) of this clause a transfer notice by or on behalf of any member or legal personal representatives of a member is given to the Company as aforesaid in regard to any ordinary share or shares the purchase money for such ordinary share or shares or for such of them as shall be purchased under this clause shall, in addition to the par value thereof, be—

(*a*) A sum bearing the same ratio to the amount of the Company's reserve fund at the date of the giving of the transfer notice as the number of shares purchased as aforesaid bears to the whole number of the then issued ordinary shares and

(*b*) A sum bearing the same ratio to the full amount of the profits of that portion of the financial year current at the date of the giving of the transfer notice which shall have elapsed at the date of the giving of such notice as the number of the ordinary shares purchased as aforesaid shall bear to the full amount of the issued ordinary shares and (*c*) A sum bearing the same ratio to the full amount or value of any other undivided or unapplied profits of any preceding financial year or years (whether or not such profits shall have been carried forward) as the number of the ordinary shares purchased as aforesaid bears to the full amount of the issued ordinary shares and it shall be sufficient in such notice to specify the amount of the purchase money per share by stating it to be a sum to be fixed in accordance with this clause (No. 34).

The certificate of the auditor of the Company as to the amount of purchase money per ordinary share which in his opinion is payable in any particular case where this clause (No. 34) applies, shall be conclusive as to the amount in that case payable.

The reserve fund named and referred to in sub-para. (*a*) of this clause is hereby declared to be the general reserve only (standing on the books of the Company on July 25, 1907, at 110,000*l.*) less the sum of 34,467*l.* 7*s.* on the same date forming part thereof.

(15.) The directors may refuse to register any transfer of a share, (A) where the Company has a lien on the share; (B) where, in the case of shares not fully paid up, it is not proved to their satisfaction that the proposed transferee is a responsible person; (C) where the directors are of an opinion that the proposed transferee is not a desirable person to admit to membership, and that without being bound to assign any reason for such opinion. But paras. (B) and (C) of this clause shall not apply where the proposed transferee is already a member holding more than 250 ordinary shares.

(16.) The Company may, by special resolution, repeal or alter any of the provisions of this clause, and the last preceding clause, but at the meetings to pass such special resolution no member shall be entitled to be present or to vote, who is not a holder of an ordinary share or ordinary shares, and the quorum of each such meeting shall be members holding one-fifth at least of the issued ordinary shares."

The respondents in the first appeal are the executors of one Percy Crossman deceased; the respondents in the second appeal are the executors of Sir William Thomas Paulin deceased. Mr. Crossman died on August 17, 1929: he was at that time the registered holder of 1000 ordinary shares in the Company. By his will he had disposed of all these shares in favour of relatives under the provisions of art. 34, sub-cl. 2, and these persons have since become the registered holders of these shares. Sir William Paulin died on February 26, 1931: at the time of his death he was the registered holder of 1600 ordinary shares in the Company. By his will Sir William Paulin gave 500 of these shares to each of his two daughters, who have since become registered holders of these shares. The remaining 600 shares formed part of his residuary estate, and on May 14, 1931, his executors served a transfer notice in respect of those 600 shares on the Company, in accordance with the provisions of sub-cl. 14 of art. 34. The price fixed under the provisions of sub-cl. 14*a* of art. 34 was 209*l*. 13*s*. 8*d*., and Sir William Paulin's executors accordingly sold and transferred these 600 shares to other members of the Company at that price. The price fixed in accordance with art. 34, sub-cl. 14*a*, in the case of Mr. Percy Crossman would have been 221*l*. 4*s*. 5*d*. The Company is a very prosperous one and had been paying a dividend at the rate of 45 per cent. annually for some years.

The Commissioners of Inland Revenue fixed the value of the shares for estate duty purposes at 475*l*. per share. In each case the executors presented petitions under the provisions of s. 10 of the Finance Act, 1894, and claimed that the shares ought to have been valued at a price fixed in accordance with sub-cl. 14*a* of art. 34. The petitions were heard before Finlay J.: the learned judge considered himself bound by a previous decision of the Irish Court of Appeal in a case of the *Attorney-General for Ireland* v. *Jameson* (1) to accept the basis for which the Commissioners of Inland Revenue contended. Subject to a subsidiary point with regard to Trust Companies as possible purchasers, with which I will deal separately, the learned judge fixed the price at 351*l*. in the case of Mr. Crossman's executors and 355*l*. in the case of Sir William

(1) [1905] 2 I. R. 218.

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Paulin's executors. From that decision the executors appealed in each case; the Court of Appeal gave judgment on July 27, 1934, and by a majority decided that the proper basis of valuation was the price for which the executors contended and allowed the appeal. From that decision the present appeals are brought.

My Lords, before expressing my own opinion, it is I think convenient to remind your Lordships of the views expressed in Ireland in *Jameson's* case. (1) That case dealt with shares in a limited company known as John Jameson, Ld., in which there were restrictions upon the transfer of shares very similar to those which are involved in the present case. The case was commenced by an information laid by the Attorney-General in Ireland, in which a declaration was asked as to the measure of value of the shares for estate duty purposes. The case was heard originally in the King's Bench Division before Palles C.B. and Kenny and Boyd JJ. (2) Palles C.B. took the view that the restrictions upon the right to transfer contained in the articles were to be disregarded altogether in assessing the value of the shares and that they were to be valued on the basis that these restrictions were merely collateral and that the shares were to be treated as freely transferable. This view was not accepted by the other two judges, who held that the shares must be valued on the basis that any purchaser in the open market would take subject to the risk of the shares being claimed by existing shareholders at the price fixed by the articles. From this latter view there was an appeal to the Court of Appeal in Ireland, which was heard by Lord Ashbourne L.C. and FitzGibbon, Walker and Holmes L.JJ. The Court of Appeal rejected both the views which had found acceptance in the Court below, and they declared that the value of the shares was to be estimated at the price which they would fetch if sold in the open market on the terms that the purchaser should be entitled to be registered as holder of the shares and should take and hold them subject to the provisions of the articles of association, including the articles relating to alienation and transfer.

(1) [1905] 2 I. R. 218.

(2) [1904] 2 I. R. 644.

In Scotland the same point arose for discussion in the case of *Salvesen's Trustees* v. *Commissioners of Inland Revenue* (1), and Lord Fleming took the same view as that which had been taken in the Irish Court of Appeal.

In view of this conflict of judicial authority, a conflict which, I am sorry to say, prevails even in your Lordships' House, I think it is convenient to begin by referring to the exact language of the Finance Act, 1894, since it is upon the construction of that statute that the question ultimately depends. Sect. 1 of that statute provides that :—

"In the case of every person dying after the commencement of this Part of this Act, there shall, save as herein-after expressly provided, be levied and paid, upon the principal value ascertained as herein-after provided of all property real or personal, settled or not settled, which passes on the death of such person a duty, called 'Estate duty,' at the graduated rates herein-after mentioned."

Sect. 2 provides that property passing on the death of the deceased shall be deemed to include certain property therein specified ; and it has been settled ever since the case of *Earl Cowley* v. *Commissioners of Inland Revenue* (2) that these two sections are mutually exclusive. Sects. 1 to 5 together form a group of sections which deal with the grant of estate duty. There follow five sections, 6–10, dealing with the collection and recovery of duty and value of property. Sect. 6, sub-s. 2, imposes a liability upon the executor to pay the duty in respect of all personal property of which the deceased was competent to dispose at his death. Sect. 7 deals with the value of property, and by sub-s. 5 provides that "the principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased." It is upon the meaning to be attached to this sub-section that the whole controversy turns.

In order to reach the right conclusion upon the construction to be placed upon the sub-section and its application to the facts of the present case, it seems to me essential to determine

(1) 1930 S. L. T. 387.

(2) [1899] A. C. 198.

what is the property which has to be valued. The respondents contended that the property fell under s. 2 and not under s. 1. The argument was that since the rights of the deceased to enjoy the produce of the shares and to dispose of them ceased with his death, the proper view was that no property actually passed on death but that upon the death there came into existence a fresh set of rights, determined by the terms of the article and belonging either to the executors or legatees or other shareholders in the Company, which might be deemed to pass under s. 2, but which did not form part of the property actually passing under s. 1. I have arrived at a very definite view that this argument is unsound. I think further that it is inconsistent with the decision in your Lordships' House in the case of *Cowley* v. *Commissioners of Inland Revenue.* (1) As Lord Macnaghten pointed out in that case, what the Act has in view for the purpose of taxation is property passing on death, not the interest of the deceased, which, if it be a limited interest, can never pass. (2) In my view, the property which passed at the death of the deceased consisted of the shares in the Company, and this is not the less true because the terms of the articles limited the rights of the deceased shareholder or of his executors to deal with the shares, and gave certain privileges and rights of pre-emption on his death. If I am right so far, it follows that the Commissioners have to estimate the price which the shares would fetch if sold in the open market at the time of the death of the deceased. The Court of Appeal have cited the well known passage in the judgment of Farwell, J. as he then was, in *Borland's Trustee* v. *Steel Brothers & Co.* (3) as to the nature of a share. It is, as the learned judge there states " the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act, 1862. The contract contained in the articles of association is one of the original incidents of the share."

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(1) [1899] A. C. 198.
(2) Ibid. 213.
(3) [1901] 1 Ch. 279, 288.

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This definition seems to me to show, with all respect to the opinion of a very learned judge, that the view entertained by Palles C.B. cannot be supported. And indeed the Crown did not seek to support it in the present case. To value the shares on the basis that the restrictions contained in the articles were to be ignored would be to value a property which the deceased never owned and which did not pass on his death. But it seems to me that the same reasoning is fatal to the conclusion reached by the majority in the Court of Appeal. Under the articles it is not possible to sell the shares in the open market until they have been offered to and refused by the existing shareholders. In order, therefore, to comply with the provisions of s. 7, sub-s. 5, of the Finance Act, it is necessary either to assume a sale in the open market of the shares, or else to limit the property to be valued to that which could be sold in the open market. The latter is the alternative which the Court of Appeal have preferred. Since the articles forbid a sale in the open market until the rights of pre-emption have been exhausted, all that the executors could sell in the open market at the time of the death was the right to receive the restricted price fixed by art. 34, sub-cl. 14*a*, from any shareholder exercising his right of pre-emption. Obviously the value of this could not exceed the sum which such a shareholder would have to pay and accordingly the Court of Appeal have held that that sum, i.e., the restricted price, is the value in the open market.

My Lords, it seems to me that this construction involves treating the provisions of s. 7, sub-s. 5, as if their true effect were to make the existence of an open market a condition of liability instead of merely to prescribe the open market price as the measure of value. The right to receive the price fixed by the articles in the event of a sale to existing shareholders under sub-cl. 14*a* is only one of the elements which went to make up the value of the shares. In addition to that right, the ownership of the share gave a number of other valuable rights to the holder, including the right to receive the dividends which the Company was declaring, the right to transmit the share in accordance with art. 34, sub-cls. 1, 2 and 3, and the

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right to have the shares of other holders who wished to realize offered on the terms of art. 34, sub-cl. 14*a*. All these various rights and privileges go to make up a share and form ingredients in its value. They are just as much part of the share as the restriction upon the sale. The construction placed upon the statute by the Court of Appeal seems to me to ignore all these elements in the value of the share and to treat as its value what, in truth, is only the value of one of the factors which go to make up that share. But the purpose of s. 7, sub-s. 5, is not to define the property in respect of which estate duty is to be levied, but merely to afford a method of ascertaining its value. If the view entertained by the Court of Appeal were correct, it would follow that any property which could not be sold in the open market would escape estate duty altogether. That seems to me quite an unnecessary and unnatural construction to place upon the language of the statute. In the words of Lord Buckmaster in *Poplar Assessment Committee* v. *Roberts* (1) " so to interpret the statute would be to deal with something which was nothing but a measure of value in such a manner as completely to destroy the very object for which that measure was set up." On the other hand, I can see no difficulty in treating the sub-section as meaning that the Commissioners of Inland Revenue are to assume that the property which is to be valued is being sold in the open market and to fix its value for estate duty purposes upon that hypothesis. A somewhat similar problem is familiar in rating cases. There the Legislature has fixed the rateable value as the rack-rent on a yearly tenancy. It has long since been established that the fact that the premises cannot actually be let on a yearly tenancy does not exempt them from liability for rates. Indeed in those cases, in order to arrive at the rateable value the Courts have had to embark upon speculations far more difficult and artificial than any involved in the present case. I think that full justice is done to the meaning of the sub-section if the property to be valued is determined by the earlier sections and s. 7 is treated as being merely a statutory direction as

(1) [1922] 2 A. C. 93, 103.

to the method by which the value is to be ascertained. In order to comply with that statutory direction, it is necessary to make the assumptions which the statute directs. This is not to ignore the limitations attached to the share. In the present case a share in such a Company as this, with an unrestricted right of transfer, would probably be worth at least twice as much as the 355*l*., which is fixed by Finlay J. On the other hand, the effect of the construction which I am putting upon the section seems to me to be the only one which does enable the provisions of ss. 1 and 2 of the statute to be carried into effect and which ensures that the property in respect of which estate duty is levied shall include all that property which passes on the death of the deceased and not merely such part of that property as could be disposed of in open market. For these reasons, I think the decision of the majority of the Court of Appeal was wrong, and that the cases of *Jameson* (1) and *Salvesen* (2) were rightly decided. This is sufficient to dispose of the principal point in the case.

There is, however, a subsidiary point upon which I must now say a few words. Before the learned judge at the hearing of the petitions, evidence was given on each side as to the value which ought to be placed upon the shares upon various hypotheses. The evidence which the learned judge seems to have accepted was that of Lord Plender, who was called on behalf of the petitioners; upon the basis of his figures, the learned judge fixed the value, on the hypothesis which I have held to be the correct one, at 351*l*. in the Crossman case and 355*l*. in the other. In fixing those figures, it appears from the judgment that Lord Plender "did not exclude anybody or include anybody in particular; he considered the matter generally." In my opinion that is the right way in which to arrive at the value in the open market. But the learned judge goes on to say that evidence was called for the Crown which indicated that a particular Trust Company would be willing to give a good deal more than the ordinary market price, because of certain particular attractions which the prospect of getting upon the share register would hold

(1) [1905] 2 I. R. 218.
(2) 1930 S. L. T. 387.

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out for such a company. The learned judge says that he excluded Trust Companies from the possible buyers because he had evidence to satisfy him that the directors would not have consented to put them upon the register. I cannot think that this is a proper reason in the view which I have taken as to the construction to be put upon the sub-section of the Act. On the other hand, I think it is a fair construction to put upon the learned judge's judgment that the extra sum which could be obtained from Trust Companies was not an element of the value in the open market, but rather a particular price beyond the ordinary market price which a Trust Company would give for special reasons of its own. I do not think that it would be right to appreciate the value of the shares because of this special demand for a special purpose from a particular buyer.

I accept the principle upon which Lord Plender gave his evidence as the correct one to apply and I think therefore that the figure which the learned judge reached of 351*l*. and 355*l*. respectively is the correct measure of value. It follows that in my opinion the judgment of the learned judge ought to be restored, the order of the Court of Appeal should be discharged, except in so far as it dismisses the cross-appeal of the Crown with costs, and that the costs of the appeal to the Court of Appeal and to your Lordships' House should be paid by the petitioners.

LORD BLANESBURGH. My Lords, the Company of Mann, Crossman & Paulin, Ld., with some of the ordinary shares in which your Lordships are, on a question of estate duty, here concerned, was incorporated as a public company in 1901 to take over and carry on an old family business of brewers. Its paid up capital of 2,250,000*l*. is divided into 125,000 5 per cent. preference shares of 10*l*. each, and 10,000 ordinary shares of 100*l*. each. The preference shares are quoted on the London Stock Exchange. The regulations of the Company with reference to these have not been printed in the Record, but, doubtless, the shares enjoy an unfettered privilege of transfer and transmission incident to shares so favoured. The ordinary shares, of course, are not quoted: Art. 34, with which we have become so familiar, effectually prevents anything of that kind. The difficulty of the case, indeed, is traceable to the circumstance that the effect of that article, coupled with the Company's exceeding prosperity, makes it practically certain that just as there has never been, so, for many a day, there will never be, any of these ordinary shares available for any actual sale or transfer to any outsider anywhere. That is not to say that the price that would be offered for the shares in the open market, if any were there available, is impossible of estimate. Far from it. With the preference shares quoted the position of the Company is well known. And the prices obtainable in the market for ordinary shares at the relevant dates have been here actually ascertained by Finlay J. The only question is whether the inquiry to which the learned judge then found the answer was one authorized by the provisions of the Finance Act.

The terms of art. 34 are in detail before your Lordships. The article is of a type, as will have been seen, more frequently discovered in the regulations of a private company than in those of a public company like this. In a business sense, no doubt, the ordinary shareholders here, and not for the first time, have, as a result of the article, become in effect a controlling private association within the frame of a public company. But in the sphere of company law—it is convenient to say so—the ordinary shares remain shares in a public company in no way distinguishable juridically from the preference shares in the same company. I have thought it helpful to the solution of the problem before the House, one with reference to its ordinary shares, that, if only for the purpose of illustration and contrast, the capitalization of the Company and the existence of its preference shares publicly quoted should be pointedly brought to your Lordships' notice.

To no more than two characteristics of art. 34 need I specially refer now. The first, surely unusual, is that the article discriminates between the male and the female holders of ordinary shares. The privileges by way of transfer and transmission to favoured transferees and appointees extended to male holders by sub-cls. 1, 2, and 3, are withheld from female holders of shares. The latter are with the male holders entitled to participate in the pre-emption privilege under sub-cl. 13, but they can only dispose of their own shares under sub-cl. 6 : while their executors after death must do so under sub-cl. 14.

This first characteristic of the article is perhaps for present purposes illuminating only ; the second is important. The article, the pre-emption clause particularly, although as is now on all hands accepted, tainted with no illegality and binding both upon the ordinary shareholders and the Company, is not fundamental in the sense in which provisions of the memorandum of association or some provisions with reference to shares contained in the Companies Act are fundamental. This has been appositely pointed out by Palles C.B. in his judgment in *Jameson's* case. (1) It is only by agreement—it is important to note this—that the article is and remains binding. It may at any time by special resolution, as indeed is in terms provided by sub-cl. 16, be altered in any and every particular. An inalienable characteristic of the regulations of the article, all important, as will be seen presently, when its relation to the Finance Act comes to be considered, is that these regulations are maintained, and may at any time be abrogated, by the agreement of not necessarily more than three-fourths in interest of the holders of the ordinary shares affected.

It is with the proper charge for estate duty on 2600 of these ordinary shares, 1000 of them passing by bequest, to the respondent, Douglas Crossman, on the death of his father, Mr. Percy Crossman ; and 1600 passing on the death of Sir William Paulin that your Lordships are here concerned.

With reference to Mr. Crossman's shares it is necessary only to say that they have been duly registered in the name of the respondent, Mr. Douglas Crossman, who is also one of his father's executors. In what follows I will for convenience of statement direct attention mainly to the ordinary shares passing on the death of Sir William Paulin, the questions of principle at issue being identical in the two cases.

(1) [1904] 2 I. R. 644, 690.

Five hundred of his shares were bequeathed by the deceased to each of his two daughters. These like the shares bequeathed by Mr. Crossman to his son, have been registered in their respective names. Sir William's 600 shares have been duly registered in the names of other ordinary shareholders in the Company, to whom under art. 34, sub-cl. 13, the pre-emption clause, they had to be offered within three months of Sir William's death and by whom they have been acquired at a price which must be taken to have been below their "principal value" as ascertained by Finlay J. by not less than 146*l.* a share. This figure may be taken to represent the value of the pre-emption rights and suggests considerations to which attention will later be directed. The 1000 shares—so destined by the deceased that their transit was not impeded by any restriction in art. 34—have passed directly to the daughters, just as preference shares of the Company would have passed under the regulations applicable to them had preference shares, in place of ordinary shares, been the subject of the specific bequest. And had that been the case the method to be adopted for ascertaining the "principal value" of these preference shares would not have been open to controversy. It being an accepted fact that the entire legal and beneficial interest therein would have, under s. 1 of the Finance Act, passed on the death of the deceased, their "principal value," ascertained by the Commissioners under s. 7, sub-s. 5, would have been taken to be the quotation for the shares current on the day of the death—the sufficient and perhaps the best criterion of the price which, had he been given the opportunity, a purchaser in the open market would have offered for the registration of the shares in his own name as successor to the deceased.

And this at once suggests the question whether in this matter of estate duty there is any essential difference between a preference share with its public quotation and an ordinary share with none. Why although not saleable in the open market should not ordinary shares passing on death be valued as if they were? Is there more in it than this, that the proof of market value, no shares of the deceased whether ordinary or preference being actually sold, is more difficult in one case than in the other? The Commissioners' question in each case is, I suggest, in effect the same. That for the preference shares has already been indicated: for ordinary shares in substance it would be "assuming the deceased's shares to be saleable in the open market as at his death, what price would they fetch?" The Commissioners here have answered that question with a figure of 475*l.* a share, and Finlay J. on appeal with a figure of 355*l.*, an answer which, subject to a qualification not in this connection relevant, has been accepted on all hands as reliable. Is there any valid reason why it should not be accepted as the "principal value" of these shares? I have been unable to find one. And there are cogent reasons in favour of its acceptance. It is almost a case of *stet decisis.* The figure embodies what Finlay J. calls the *Jameson* principle (1), now thirty years old, approved since in Scotland (2) and in the Irish Free State, nowhere questioned, and acted upon by the Revenue Authorities all along, their invariable practice having been to treat the sum analogous to Finlay J.'s 355*l.* as the "principal value" of such a share as are the ordinary shares in this case.

It is only now that a majority of the Court of Appeal in England, declining to follow the *Jameson* case (1), has held that the "principal value" of each of Sir William Paulin's 1600 ordinary shares is for the purposes of estate duty not 355*l.* but 209*l.* 13*s.* 8*d.* and no more—their pre-emption price already referred to.

My Lords, it can, I believe, be shown that this sum for each share thus arrived at, so far from being its "principal value" is by the Finance Act itself denied that description. But in my judgment as the *Jameson* (1) principle is sound, and Finlay J.'s valuation ought not to have been displaced, it may be most convenient that, reserving that point, I should at once trace and, where necessary, seek to justify the course which led to it. There will as a result be clearly disclosed the point at which, and the justification or want of it with

(1) [1905] 2 I. R. 218.

(2) 1930 S. L. T. 387.

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which, the Court of Appeal separates itself from a principle and subsequent practice so well authenticated, so uniform, and so thoroughly established.

But may I by way of introduction and preface, say one or two things, general in character? The question at issue between the Crown and the respondents should be recalled. It has been happily stated by Romer L.J. (1) as follows :—

"Are the shares to be valued" 'under s. 7, sub-s. 5, of the Act' "on the footing that a purchaser would, in spite of the articles of association, be forthwith entitled to be put upon the Company's register in respect of them, or are they to be valued upon the footing that the purchaser would only obtain such right in respect of the shares as Sir William Paulin could at the time of his death have conferred upon him consistently with these articles."

The first of the Lord Justice's alternatives embodies the *Jameson* principle (2), applied by Finlay J. The second is that finally adopted by Slesser L.J. and himself, and I would at once emphasize with regard to it the fact that the value so arrived at was in the Lord Justice's view the "principal value" of the only property in the shares which passed on the death of the deceased—the duty, as he explained at the commencement of his judgment, being chargeable only under s. 1 of the Act. The seriousness for this reason in the difference between the two alternatives will emerge as we proceed.

I would next generally observe that the working of s. 7, sub-s. 5, of the Finance Act in some respects at least is now well ascertained. Some principles governing its application are either accepted or easily justified. If these are borne in mind in this case the issue of the appeal, otherwise confused and involved, becomes, as I venture to think, relatively clear if not indeed inevitable.

Here are some of the fundamentals on which the working of s. 7, sub-s. 5, must now, in my judgment, be taken to proceed :—

(1.) The "property" the "principal value" of which is

(1) [1935] 1 K. B. 26, 55. (2) [1905] 2 I. R. 218.

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thereunder to be estimated by the Commissioners is the whole property brought into charge by the Act, and not a part of it only.

(2.) Such " property " may include many items over which the deceased had no power of disposition while he lived and over which his executor has none after his death.

(3.) If the duty of the Commissioners is, as I think, to estimate the price which the " property " as at the time of the deceased's death would fetch in the open market, were it there to be offered for sale, it is unnecessary to inquire by whom the property would hypothetically have to be offered. It must not, however, be assumed that property passing under s. 1, whose price in the market is to be estimated by the Commissioners, is necessarily or even relevantly confined to property at the disposition there either of the deceased or his legal personal representative. A consideration of the circumstances surrounding the notional sale under the section of the corpus of settled property which in terms passes on death under s. 1, displaces of itself any such assumption. In such a case the deceased normally never has had in the corpus of the settled property any interest at all, while his interest in the income has ceased with his death. In other words any decision which would confine property passing under s. 1 of the Act to property of which the deceased or his representative could dispose in the open market must be justified, if it is to be accepted. Is that limitation attached by the Court of Appeal in the present case tenable? That is the question the respondents have to face.

(4.) Except in cases within s. 3 of the Finance Act it is quite immaterial to whom the property has actually passed, whether to purchasers, legatees, or, in the case of pre-empted shares, to other members of the Company issuing them. The question for the Commissioners is not to whom has the property passed. The question is whether it has passed at all. If it has passed, then subject only to a case covered by s. 3, no existing contract with reference to the property, although it be binding on the deceased's estate, has any influence upon the Commissioners' estimate of the price

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which in the open market the property would fetch. In this connection s. 3 of the Act, quite neglected by the Court of Appeal, and with its importance emphasized so far only by Palles C.B., will be found to be illuminating. For the moment, however, I pass the section by; observing, as I conclude this general survey, the indication thereby supplied, that the solution of the difficulty between the Crown and the respondents in the present case will ultimately turn upon the answer to two questions:—

(1.) What was the property in his ordinary shares which passed or, it may be, was deemed to pass upon the death of the deceased; and

(2.) What influence, if any, does the pre-emption clause in art. 34 exercise over the parcels to be included in the notional sale of that property as envisaged by s. 7, sub-s. 5, of the Act.

Proceeding now to deal with the case presented by the Crown my answer to the first question is that it was the deceased's entire legal and equitable interest in his ordinary shares which so passed; each share a separate entity—a "property" within the meaning of the Act charged to duty as it passed "in the ordinary sense of the term from the deceased into the possession and property of another person after his death": see per Lord Watson in *Attorney-General* v. *Beech*. (1) And, my Lords, I desire to emphasize the fact that the property which so passed was "one indivisible piece of property" as FitzGibbon L.J. described it to be in *Jameson's* case. (2) *Borland's Trustee* v. *Steel Brothers & Co.* (3), outstanding decision as in its proper sphere it is, had as its purpose an analysis of the nature and effect of the different rights and incidents attached to a share, so as to enable a decision to be taken as to their legality in instances in which legality was questioned. But the judgment does not suggest that a share in a joint stock company may not properly be described in FitzGibbon L.J.'s words or by others to the like effect. A tribunal would be rash indeed

(1) [1899] A. C. 53, 58.
(2) [1905] 2 I. R. 218, 228.
(3) [1901] 1 Ch. 279.

to deny that description to things which pass as such by transfer in myriads, I suppose, every month if not every week, and pass only less frequently by transmission, surrender, or on forfeiture. As such a piece of property a share may be the subject of lien, and in the case of the *Bradford Banking Co.* v. *Briggs* (1) the shares over which the lien there extended were, not once only, referred to by Lord Blackburn as " property." Again in the *Colonial Bank* v. *Whinney* (2), where shares in a railway company were held to be included in the expression " choses in action " in the proviso to the order and disposition section of the Bankruptcy Act, 1883, Lord Blackburn in his judgment, speaking of the shares in question in that very case, said that they were also " personal chattels " the property in which did not pass by mere delivery but did pass by a deed of transfer duly stamped. I cannot bring myself to doubt that it is in this sense and in this sense only that shares in joint stock companies are " property " within the meaning of the Finance Act charged to duty under s. 1 as therein stated. To all the shares here in question I would mutatis mutandis apply the words already referred to used by FitzGibbon L.J. in *Jameson's* case (3) :—

" Each of " the 750 shares there in question, he says, " with all rights and liabilities, and all advantages and disadvantages, incident to its ownership, passed on Henry Jameson's death to his executors as one indivisible piece of property. In conveyancing phraseology, the executors took each share ' to hold in as full and ample a manner as the same was held by Henry Jameson at his death.' " And later the Lord Justice adds (4) : " The basis of my construction of the Act is the unity and indivisibility of Henry Jameson's property in the shares. I cannot adopt any procedure, or accept any solution of the question in dispute, which splits up that interest for any purpose."

And at this point, my Lords, I venture to insist upon the importance no less than the soundness of the above views of

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(1) (1886) 12 App. Cas. 29.
(2) (1886) 11 App. Cas. 426, 434.
(3) [1905] 2 I. R. 218, 228.
(4) Ibid. 230.

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the Lord Justice as applied to the shares in the present case. First, it is, I think, of quite major importance to the whole commercial community that these views, if they are sound, should be upheld. The troubles which would follow any departure from them were well illustrated by Mr. Radcliffe's argument on behalf of the respondents. Applied to the ordinary shares of this Company, with the discrimination in the articles against female holders, the analytical method advocated by counsel would attribute one quality and character to the shares held by women, and another to the shares held by men. And, in varying degrees, no one share of an issue would be like another. The truth indeed is that *Borland's* case (1)—most apposite in *Jameson's* case when in the Divisional Court (2), where the legality of the restrictions on the shares there in debate was the main question at issue—ceases to be important (I had almost said that it ceases to be relevant) in this case, where the complete legality of art. 34 is in every particular fully recognized. And secondly I venture to insist upon the view of the Lord Justice in order that with its support I may meet in advance a view presented by Palles C.B. in his judgment in *Jameson's* case (3), one which although not accepted by the Irish Court of Appeal then, nor alluded to by either Slesser L.J. or Romer L.J. now, was, at least partially, revived at your Lordships' Bar by learned counsel for the respondents. That view, as expressed by the Chief Baron, was that while the whole legal and beneficial interest in each of the shares then in question passed on the death of the deceased, it so passed in what may be called two parts: (1.) the share subject to the right of pre-emption—"property" within s. 1 of the Act; and (2.) the right of pre-emption itself—"property," that is, under s. 2 (*b*), in which the deceased had an interest ceasing on his death "in respect of which a benefit accrued or arose by the cesser of such interest," and which was therefore "deemed to pass under that sub-section." It was, on this point alone, that FitzGibbon L.J. differed from the Chief Baron, and upon

(1) [1901] 1 Ch. 279.
(2) [1904] 2 I. R. 644.
(3) [1905] 2 I. R. 218.

it for the reasons I have given I find myself at one with the Lord Justice. Later I must refer to this matter again. But if, passing it by for the moment, I may now assume that the entire property of the deceased in his ordinary shares did pass on his death under s. 1 of the Act, then the ascertainment of the "principal value" of these shares becomes, on the *Jameson* principle (1), simple and entirely consistent with the scheme of the Act in this regard.

First, as it would indubitably be in the case of the quoted preference shares of the Company, it is the price in the open market obtainable for the shares as at the date of the death which has to be estimated, the price for the shares, each as an entire thing, which have passed to their present registered holders in succession to the deceased.

And, next, if the Commissioners' notional sale is to be a sale of the entire share just as it belonged to the deceased immediately before his death, then registration of the share in the name of the notional purchaser must also be offered. Romer L.J. concedes this fully. With reference to the property to be valued "it is obvious," he says, "that the Commissioners must assume that the property can be transferred to the hypothetical purchaser. (2)"

This same conclusion is thus put by the Chief Baron in *Jameson's* case. (3) The hypothetical sale and purchase, he says (3), "must be a sale of the property which the deceased had in the shares at the time of his death—that is, of the entire legal and benefical interest therein, of that interest by virtue of which the deceased had been, and had been entitled to be, 'a member' of the Company in respect of such shares; a sale by virtue of which the purchaser thereat would have been entitled to have had that which he had bought vested in him in the same manner as it had been vested in the deceased, and consequently under which he would be entitled to be registered as a member in respect of those shares" and later (4), after saying that the supposed sale is being made in the open market on the assumption

(1) [1905] 2 I. R. 218.
(2) [1935] 1 K. B. 26, 57.
(3) [1904] 2 I. R. 644, 683.
(4) Ibid. 689.

that the open market is available, the Chief Baron proceeds: "And upon this assumption, which is the supposition the statute directs us to make, we must exclude the consideration of such provisions in the articles of association as would prevent a purchaser at the sale from becoming a member of the Company, registered as such in respect of the shares purchased by him at such supposed sale. If we do not, we do not give effect to the assumption the statute coerces us to make." That is to say, the preventive provisions of the article are to be ignored in relation to the notional sale, whether they provide for the other shareholders' rights of pre-emption or for the approval by the directors of every transfer. Had this principle been remembered or accepted at the hearing of this case, the difficulty created by the directors' proved objection to a trust company as shareholder could never have arisen. It would have been seen at once to be quite irrelevant to the question before the Court.

But the pre-emption rights definitely withdrawn from interference by that general principle, are—and this is a most important aspect of the case—separately ruled out by s. 3 of the statute, to which now attention must again be directed. Once more I return to the judgment of Palles C.B. in *Jameson's* case for a lucid statement of the position, so regarded: "The substance of the argument for the defendant was," he says (1), "that the executors were, on the death of the deceased, under an enforceable obligation to sell the shares at 100*l.* each," [the pre-emption price of the *Jameson* shares] "and that this obligation ascertained and fixed their maximum value for the purposes of the Finance Act. During the argument I asked Mr. Ronan whether he contended that the provisions in the articles amounted to, or contained, 'a bona fide contract of purchase of the shares from the deceased for full consideration in money or money's worth paid to him for his own use or benefit' within s. 3 of the Finance Act; or that the case was otherwise within that section. He replied that he did not; and, consequently I leave this third section out of consideration altogether."

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(1) [1904] 2 I. R. 644, 682.

Now, it is plain that, with reference to the pre-emption rights here—at 209*l.* 13*s.* 8*d.* for each share—no other answer could be given. No one could suggest that that sum was a "full consideration" for any ordinary share at the death of the deceased. It is stated, indeed by Romer L.J. in his judgment that each of these shares in the name of either of Sir William Paulin's daughters was worth 355*l.* The result therefore is that, it not being possible to rely on s. 3, the existence of the pre-emption right here must be ignored so far as the parcels of the Commissioners' notional sale are concerned.

May I elucidate this position by an illustration, so drawn as to have regard to the regulations in this respect governing the ordinary and preference shares respectively of the Company. Let it be supposed that a deceased person had in his lifetime purchased two jewels from a dealer in Hatton Garden; one a diamond brooch; the other, shall we say, a string of pearls—the pearls an out and out purchase, but the brooch purchased on the terms that if the deceased retained the jewel at his death and died without making it the subject of a specific bequest, the dealer was to have the right to purchase it from his legal personal representative for, shall we say, 1000*l.* The deceased died intestate, retaining both jewels. At his death the price obtainable for the brooch in the open market was 3000*l.* And this, too, was the value of the pearls. The dealer claimed the brooch from the administrator, as he was entitled to do, at 1000*l.*, and it was handed over to him on payment of that sum. In these circumstances what was the "principal value" of the brooch? Like the value of the pearls, it was, I suggest, undoubtedly 3000*l.*, and for the reason that the dealer's pre-emption price was not a "full consideration" protected by s. 3 of the Act. So far, the analogy between the brooch and the ordinary shares here is complete, just as is that between the pearls and preference shares in the Company. But there, so far as concerns the ordinary shares and the brooch, the analogy ends. The pre-emption right over the brooch never comes within the purview of the Commissioners at all for the reason that the right does not burden the brooch in the hands of its notional purchaser. But to the ordinary shares in the purchaser's hands the pre-emption rights continue to attach and, affecting the value of the shares, as they do, must be duly discounted by the Commissioners in their estimate of the price a purchaser would give for them.

And, my Lords, it is at this point, more perhaps than at any other, that I find myself in accord with the *Jameson* principle (1) and in fundamental difference with the views of the majority of the Court of Appeal. The Lords Justices here have, it would seem, taken no account of s. 3 of the Act, the application of which to the pre-emption clause, in itself a mere agreement in respect of his ordinary shares binding upon the deceased, is, I hope, made clearer by the illustration just offered.

The resulting misapprehension appears most clearly in the judgment of Kenny J. in *Jameson's* case (2), which is approved by Romer L.J. The learned judge actually assumes that a right of pre-emption with the price payable thereunder will of itself prevail against a valuation under s. 7, sub-s. 5. "There is nothing," he says, "to prevent a man from agreeing for a purchase of property, and giving a right of pre-emption as part of his contract." Quite true; and nothing in the Finance Act interferes with the due fulfilment of any such contract. The Act has not in the present case interfered with the exercise by the other ordinary shareholders of their pre-emption rights over 600 of Sir William Paulin's ordinary shares. But unless the pre-emption price is a "full consideration" under s. 3 of the right of pre-emption will not be effective to withdraw the property from the operation of s. 7, sub-s. 5, of the Act.

And, my Lords, it was by the application to the facts of this case of the *Jameson* principle (1) as just traced that Finlay J.'s price of 355*l.* for each ordinary share of the deceased was reached. And that principle and its application here I have in this judgment sought to justify. I have done so, largely by quotations, too copious perhaps, from the judgment of the Chief Baron in *Jameson's* case. (3) I have made these

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(1) [1905] 2 I. R. 218.
(2) [1904] 2 I. R. 664, 671.
(3) Ibid. 682.

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quotations verbatim in order that they might appeal to your Lordships by their own inherent strength. The whole judgment of the Chief Baron I have found to be a masterly presentment of the problem before the House, a judgment which must always have been regarded as the most vital of any delivered then, had it not been consistently discounted by what I cannot help thinking has been a serious misapprehension as to the conclusions actually reached by him. The Chief Baron's real conclusion in *Jameson's* case is expressed in the terms of the declaration with which he prefaces his judgment. (1) That declaration, it will be found, is followed almost textually by the Court of Appeal in Ireland (2), who to the concluding words of their declaration, " and should take and hold them subject to the provisions of the articles of association," add the words " including the articles relating to alienation and transfer of the shares of the Company (3) " not because of any difference with the Chief Baron but because the Attorney-General, abandoning his previous contention to the contrary in the Divisional Court, without reserve admitted in the Court of Appeal (see per Holmes L.J. (4) the legality of these articles and their binding effect upon the Company and all its members.

In the Court below, the Chief Baron so far from ignoring altogether, as has been imputed to him, the restrictive regulations, attributed to them full force as an agreement which, as above shown, they were, refusing only to recognize them as fundamental provisions like those required by statute, which they were not. As to *Borland* (5), in deference doubtless to the argument of the Attorney-General he did not then accept the decision of Farwell J. as to the legality of the regulations. Upon that question he reserved his final opinion—but for the purposes of his then judgment he could and did assume the regulations to be valid. The suggestion which appears in the judgment of Slesser L.J. that the Chief Baron treated the shares in the hands of the notional purchaser as being in the matter of conditions different in some way from the other ordinary shares of the Company, I believe to have been made inadvertently. If this judgment has no other result, it will at least, I hope, direct the attention of the profession to a pronouncement which, albeit on one point, as I venture to think, open to criticism, ought justly to have its proper place amongst the notable deliverances of a very great judge.

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(1) [1904] 2 I. R. 682.
(2) [1905] 2 I. R. 227.
(3) Ibid. 240.
(4) [1905] 2 I. R. 237.
(5) [1901] 1 Ch. 279.

I turn now to the judgments of the Lords Justices now under review and the views enunciated by them. My answer to these will really be found in what has preceded. The process of reasoning by which Slesser and Romer L.JJ. reached their conclusion is made specially clear in the judgment of Romer L.J., who deals in detail with each aspect of the problem.

First of all, as I have already noted, the case was in his judgment a case under s. 1 of the Act. Upon Sir William Paulin's death his ordinary shares, the Lord Justice says, passed "within the meaning of s. 1 of the Finance Act." And what so passed under the designation of a share which had to be valued for the purposes of estate duty the Lord Justice describes as "nothing more than the totality of" [the deceased's] "rights and liabilities as they exist under the provisions of the Companies Act and the constitution of the . . . . Company." There was nothing in s. 7, sub-s. 5, of the Act to suggest to his mind even remotely "that what is to be treated as being sold is something other than the property that passes upon the death." And his next statement reduces most usefully the limits of the controversy. "If a share in Mann, Crossman & Paulin, Ld., be regarded merely as a right to get placed on the register of members with the rights and subject to the liabilities that would result from such registration, the principal value of such share must of course be ascertained upon the footing that the right can be conferred upon a purchaser in the open market. If, on the other hand, as I think is the case, the inability to confer upon such a purchaser a right of registration is a part of the essence of a share, its value must be ascertained with a due recognition of that fact."

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My Lords, this statement shows how narrow is the controversy. For, no one suggests, I think, that there can under the Act be any valuation or estimate of the price of any property which has neither passed nor been deemed to pass thereunder. On the other hand the Lord Justice agrees that, if the view of the Crown is correct as to the extent of the property in the shares which did pass here, then the *Jameson* principle (1) is rightly applicable to the very end. The Lord Justice in short makes it clear that the real controversy is over the question, what was the "property" which under the Act passed when on Sir William Paulin's death his ordinary shares were registered in the names of his daughters and the pre-empting shareholders. Was there anything more left for the Commissioners to do in reference to all these shares than to estimate the highest price which in the open market would be offered for the privilege of being registered as their holders? That is the view of the Crown. It is perhaps only by stating the question in that objective form that the essential simplicity of its case is realised.

On the other hand, the opposite view of the Lords Justices above set forth is, I think, correctly interpreted by the respondents in the third reason of their printed case, where they describe the price in the open market to be estimated by the Commissioners under s. 7, sub-s. 5, as being the price of ordinary shares in the Company offered "upon terms that a transfer notice giving the holders of the remaining ordinary shares a right of pre-emption at the prescribed price was to be duly served in accordance with art. 34 and that the hypothetical purchaser in the open market was to have the right to become the registered holder of the shares sold to him in the event of such right of pre-emption not being exercised or, in the event of such right of pre-emption being exercised, to receive the prescribed price payable for such shares under art. 34 by the member or members purchasing the same."

I do not know, my Lords, why, on the principle there invoked, the pre-emption rights should have been so carefully safeguarded and the directors' veto on any transfer should have been so completely ignored. It may have been felt that, with that veto also interposed, there would not be left for offer in the open market even the "restricted and fettered thing" described by Kenny J. To me the omission is eloquent as illustrating the length to which the respondents are necessarily driven by this process of analysis to which for the purpose of its valuation they subject a share which passes under the Finance Act. If it was a share which passed, it was surely something very different which became the subject of valuation or notional sale.

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(1) [1905] 2 I. R. 218.

But there are positive objections to which, as I think, the views of the Lords Justices are open. These, I can in view of what has been already said, state summarily :—

1. Their order does not treat each share as a single entity, which for reasons already given I believe to be essential: also, with, as I hope I have shown, no justification, it makes the power of the deceased or his executors to dispose of a share in the open market the test of the extent of the property in it which passes under the Act.

2. Dividing the shares, it would seem, as Palles C.B. rightly or wrongly divided them, the Lords Justices omit to have regard to the second interest indicated by the Chief Baron—namely, the value of the pre-emption right "deemed to pass" under s. 2, but have regard only to the first right which "passed" under s. 1 of the Act. Upon the principle adopted by them over one-third of the ascertained "principle value" of each ordinary share escapes duty altogether.

3. The order fails to recognize that while the pre-emption clause of art. 34 is valid and binding upon every holder of ordinary shares, it is in view of s. 3 of the Finance Act ineffective in present circumstances to prevent a notional offer of the shares for sale in the open market; although effective, as it remains binding on the notional purchaser, to reduce the price they will fetch there. In truth the result of the order of the Court of Appeal is to give to the respondents the benefit of s. 3 of the Act in a case to which that section has no application.

My Lords, learned counsel for the respondents, seeking for

Lord Blanesburgh.

safety perhaps, and abandoning the finding of Romer L.J. to the contrary, raised at your Lordships' Bar for the first time the contention that in this case the duty was not chargeable under s. 1 of the Act, but in large measure, if not altogether, under s. 2, that for no duty beyond that on the pre-emption price were the respondent executors, as such, chargeable; and that the order of the Court of Appeal on that ground alone should be affirmed, for that it was only as an executor that any respondent had been sued.

The answer I would make to that contention is twofold. The first, that for the reasons I have given, the whole duty on the 355*l.* a share is chargeable under s. 1. But if, on the Chief Baron's view, any part of it had to be borne under s. 8, sub-s. 2, then it was, I think, too late for the executors to raise that objection for the first time at your Lordships' Bar. The case from the outset has been concerned with the amount payable in respect of estate duty and not with its ultimate incidence. I have no doubt that throughout the proceedings the executors willingly allowed themselves to be treated as liable for any estate duty chargeable in respect of these shares. Provided that the amount of duty chargeable was not thereby increased, the assumption of personal liability had, I doubt not, no terrors for them.

I agree with, I believe, all your Lordships in thinking that any possible bid for the shares by a Trust Company was allowed for by Lord Plender in his estimate of 355*l.* a share, accepted by the learned judge as reliable. Had that not been so the Crown's contention on this point would have been, I think, unanswered.

But with that fact in view, it fails.

My Lords, on the whole case I am in complete agreement with the motion just made by the Lord Chancellor.

LORD RUSSELL OF KILLOWEN (read by LORD MACMILLAN). My Lords, the question at issue in these cases is how, under the provisions of the Finance Act, 1894, are the ordinary shares in a company called Mann, Crossman & Paulin, Ld., to be valued. It is not a question of ascertaining their actual value, or their true value, or their intrinsic value, or their value in some particular person's ownership. The value to be ascertained is their statutory value. I emphasize this at the outset, because the only tax imposed by s. 1 of the Finance Act, 1894, is, to quote the words of the Act, "upon the principal value ascertained as hereinafter provided" of property passing on death.

The relevant section for the purpose of ascertaining the value of such property is s. 7; and in particular sub-s. 5 thereof. The matter resolves itself therefore into the true construction of that sub-section.

Before referring to its terms, let me mention briefly the relevant facts as they relate to the shares owned by the testator, Sir William Paulin. It is conceded that the same principles apply to the case of both testators, and that a decision in one case will govern the other.

The Company's articles contain special provisions as to ordinary shares, the effect of which (so far as they apply to Sir William Paulin's shares) I can state briefly, but I hope accurately, thus: A male holder can transfer inter vivos to persons falling within a defined class and being in other respects in the opinion of the directors duly qualified for membership. A male holder can by testamentary disposition appoint to any of the same class, and such appointee will be entitled to a transfer of the shares from the legal personal representatives of the appointor, if within three months of his death the directors signify approval of the transferee. Except where a transfer is made pursuant to the above powers (and certain other immaterial cases) a member proposing to transfer shares can only do so after a period of three months, and then only if no member has been willing to purchase them at par plus certain additions defined by the articles. During the three months the other members have the overriding right of pre-emption at this fixed price. It is only if and to the extent to which this right is not exercised, that the proposing transferor can sell and transfer shares to any person and at any price. The shares of a deceased member which have not been appointed by his will under the powers indicated above, are similarly subject to an overriding right of pre-emption in the other members at the fixed price; and it is only if and to the extent to which this right is not exercised that the member's legal personal representatives can sell and transfer the shares to any person and at any price. Finally the directors may refuse to register any transfer of a share (amongst other cases) where they are of opinion that the proposed transferee is not a desirable person to admit to membership and that without being bound to assign any reason for such opinion; but this power does not apply where the proposed transferee is already a member holding more than 250 ordinary shares.

Sir William Paulin was the owner and registered holder of 1600 fully paid ordinary shares of 100*l.* each in the Company. By his will he appointed 500 of these shares to each of his two daughters, leaving the remaining 600 shares to become subject to a residuary trust for sale. He died on February 26, 1931. Thereupon the 1600 ordinary shares passed to the executors appointed by his will, and in order to "ascertain as hereinafter provided" the principal value of all property which so passed, recourse must be had to s. 7 of the Finance Act, 1894. By sub-s. 5 of that section it is provided that the principal value of any property shall be estimated to be the price which in the opinion of the Commissioners such property would fetch if sold in the open market at the time of the death of the deceased. The crucial question in this appeal is what price would these 1600 shares fetch in the circumstances specified?

There can, I think, be no doubt, and indeed it was conceded, that in estimating the value of Sir William Paulin's shares in accordance with this provision, no difference can be drawn between the 1000 shares appointed to his daughters and the 600 shares which form part of his residuary estate. The yard-stick is the same for each; the shares are imagined to be the subject matter of a sale in the open market at the time of the death of Sir William Paulin and an opinion must be formed as to the price which they would fetch. The whole process is hypothetical, but the parcels to be hypothetically

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sold are the shares. Further, since the hypothetical sale takes place at the time of the death, the hypothetical vendor must be either the dying shareholder or his legal personal representative. Probably the former, so as to meet the case where no legal personal representative exists. But for the purposes of this case it matters not which, because both in the case of the dying shareholder and of his legal personal representative the subject matter of the sale would be shares over which under the articles of association the other members of the Company had an overriding right of pre-emption.

It is the existence of this right of pre-emption which is the foundation of the dispute between the parties, the appellants contending that it must be disregarded in estimating the price under s. 7, sub-s. 5, the respondents contending that it cannot be disregarded and that its existence in the circumstances of the present case controls and limits the price which the shares would fetch in the open market.

A similar dispute has been the subject of decision in the Irish Courts. In the case of *Attorney-General for Ireland* v. *Jameson* (1) it was held by a majority in the King's Bench Division in Ireland that in applying the provisions of s. 7, sub-s. 5, of the Finance Act, 1894, regard must be had to the special provisions in a company's articles of association with reference to alienation and transfer of the shares of the company and as to "fair value," but that the amount of the principal value was not necessarily limited to the par or fair value of the share. In that case the shares were 100*l.* shares and the right of pre-emption was at 100*l.* or such other sum as should from time to time be fixed as the fair value by resolution of the company in general meeting. On appeal the Court of Appeal (2) held that the price should be estimated upon the footing that the purchaser would be entitled to be registered as holder of the shares, but would take and hold the shares subject to the provisions of the articles of association, including the articles relating to alienation and transfer of the shares of the company. This decision has been followed

(1) [1904] 2 I. R. 644.

(2) [1905] 2 I. R. 218.

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by Lord Fleming in Scotland: *Salvesen's Trustees* v. *Commissioners of Inland Revenue.* (1)

Your Lordships have to determine which of these divergent views is the correct interpretation of s. 7, sub-s. 5.

Finlay J., as I think he was in comity bound to do, followed, in the present cases, the decision of the Court of Appeal in Ireland. On appeal from him the Court of Appeal here have by a majority reversed his decision, and have adopted the views and reasoning of the majority in the King's Bench Division in Ireland. Where such a conflict of judicial opinion exists, the question must obviously be no easy one to answer; but for myself I feel bound to concur in the views expressed by Kenny and Boyd JJ. in Ireland and by Slesser and Romer L.JJ. in the present case.

A share in a limited company is a property the nature of which has been accurately expounded by Farwell J. in *Borland's Trustee* v. *Steel.* (2) It is the interest of a person in the Company, that interest being composed of rights and obligations which are defined by the Companies Act and by the memorandum and articles of association of the company. A sale of a share is a sale of the interest so defined, and the subject matter of the sale is effectively vested in the purchaser by the entry of his name in the register of members. It may be that owing to provisions in the articles of association the subject matter of the sale cannot be effectively vested in the purchaser because the directors refuse to and cannot be compelled to register the purchaser as shareholder. The purchaser could then secure the benefit of the sale by the registered shareholder becoming a trustee for him of the rights with an indemnity in respect of the obligations. In the case of the sale of such a share the risk of a refusal to register might well be reflected in a smaller price being obtainable than would have been obtained had there been no such risk. The share was property with that risk as one of its incidents.

But a further restriction may exist, as in the present case. The articles may stipulate that a shareholder must first give existing shareholders the chance of buying his shares at a price fixed and not competitive. In such a case a sale to an outsider of the shareholder's interest in the Company must and can only be made subject to that obligation, which is one of the incidents which attach to and are part of the subject matter of the sale; and the sale to the outsider must necessarily include as an incident of the subject matter of the sale, the right to receive the fixed price if the right of pre-emption is exercised by the other shareholders. The consequence is that by reason of the nature and incidents of the subject matter of the sale, neither Sir William Paulin nor his executors, at the time of the death, could have sold these shares in the open market to any one otherwise than subject to the right of pre-emption at the fixed price. The result of the existence of this right of pre-emption must inevitably be that no one at an actual sale in the open market would be prepared to offer more than the fixed price if even that.

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(1) 1930 S. L. T. 387.

(2) [1901] 1 Ch. 279.

How can any higher price be, in the Commissioners' opinion, the price which the shares would fetch at the hypothetical sale envisaged by s. 7, sub-s. 5? What justification is there for saying that the shares to be sold at the hypothetical sale are to be free from the rights of pre-emption; that they are in other words to be hypothetical shares? I can find none in the language used. The sub-section is perfectly general in its terms, dealing with "any property" and therefore covering all property which passes on the death; and the Commissioners have to form an opinion as to the highest price which a person in the "open market" would be prepared to pay for the particular property under consideration. That I conceive is the price which "such property would fetch." But the property must surely be the property which is being valued, with all the rights and obligations which attach to it and are inherent in it. I can see no word in the sub-section which justifies a different view. If the property in question is that bundle of rights and obligations known as a share in a limited company, the entirety of the bundle must surely be the subject matter of the sale and not part only. The requirement that property be sold in the open market cannot alter the nature or character of the property which is there offered for sale. The words "open market" postulate freedom of access to the market, not freedom from restrictions attaching to the subject matter of the sale.

I find myself in agreement with the views expressed by Kenny and Boyd JJ. in the *Jameson* case (1) and by Slesser and Romer L.JJ. in the present case. I can find nothing in the sub-section which would justify me in holding that the vendor on the hypothetical sale is to be considered as selling something which is affected by fewer restrictions than those to which it was subject in the testator's hands. So to hold would be, as pointed out by Boyd J., to trespass on the province of the Legislature and add words to the sub-section. Neither can I see any logical basis for treating the property offered at the hypothetical sale as being free from some of the restrictive features attaching to it, but remaining subject to others. Nor have I heard any satisfactory answer to the difficulty stated by Romer L.J. when he said: "I can find nothing in s. 7, sub-s. 5, to warrant the Commissioners in estimating the value of a property passing on death by reference to the price that would be paid in the open market for property that did not so pass."

One of your Lordships professes to derive some assistance, or comfort, from a decision of my own in the case of *In re Cassel*. (2) I myself am not so fortunate. I have recently explained in *Christie* v. *Lord Advocate* (3) how very special that case was in its facts; and that all that I did was to indicate, as best I could, the lines upon which a valuation might fairly be reached of a benefit which (being purely personal) could not be offered for sale at all. The soundness of the decision in *Attorney-General for Ireland* v. *Jameson* (4) never came under consideration in *In re Cassel*. (2)

My Lords, I end as I began. The only tax imposed is on the principal value of property passing on the death, to be ascertained according to the statutory provision. It is the statutory value and no other value which has to be ascertained. Upon the facts of these cases the value according to the

(1) [1904] 2 I. R. 644.
(2) [1927] 2 Ch. 275, 281.
(3) [1936] A. C. 569.
(4) [1905] 2 I. R. 218.

provisions of the statute, cannot exceed 209*l.* 13*s.* 8*d.* in the case of the Paulin shares, and 221*l.* 4*s.* 5*d.* in the case of the Crossman shares.

I would dismiss the appeals.

In the view which I take, the question as to the exclusion of any class of possible purchasers from the open market does not arise; but I feel a difficulty in understanding how, if Lord Plender's figure is accepted, as it was by Finlay J., any higher figure could rightly be substituted for it. As I read the learned judge's judgment, Lord Plender in arriving at his figure had treated the market as open, and had excluded no one from it. The whole world was hypothetically there, making hypothetical bids.

LORD MACMILLAN. My Lords, in common with my noble and learned friend Lord Russell of Killowen I find myself constrained to take a different view of these cases from that which has commended itself to the majority of your Lordships. The problem is one of a type with which your Lordships are only too familiar, the problem of applying a statutory enactment to circumstances which were manifestly not in the contemplation of the Legislature when it was enacted. That in the discharge of such a task differences of judicial opinion should emerge may be matter of regret but is scarcely surprising.

I begin, however, by agreeing with all your Lordships that the shares with which these appeals are concerned are, within the meaning of s. 1 of the Finance Act, 1894, property which passed on the death of the shareholders. The controversial question relates to the ascertainment of the principal value of these shares for estate duty purposes. The statute enacts that it is to be ascertained as provided in s. 7, sub-s. 5, which directs that it "shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

My Lords, a share in a joint stock company is an entirely conventional creation; the congeries of rights and liabilities of which it consists is the creature of the Companies Acts and the memorandum and articles of the particular company. Within the law the rights and liabilities appurtenant to a share may vary widely. But it cannot exist independently of the inherent attributes with which it has been created.

When therefore the Legislature directs that these shares are to be conceived as being exposed for sale in the open market, in order to see what price they would fetch I must conceive them as being offered to purchasers with all their attributes. If they are subject to conditions which restrict either the rights of enjoyment or the rights of alienation of the holder, then the sale must be of the shares as so restricted. The Finance Act confers no power to strip the shares of any of their inherent attributes. The sale, no doubt, is a hypothetical sale, but the hypothesis is that the thing itself is being sold as it stands with all its qualities and all its disabilities. If the analogy of the hypothetical tenant is invoked, I may pray in aid the words of Lord Buckmaster in the case of the *Port of London Authority* v. *Assessment Committee of Orsett Union* (1), where he says: "The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament."

My Lords, in the present case, I am of opinion that neither the right of pre-emption nor any of the other conditions and restrictions inherently affecting the alienation of these shares can justifiably be left out of account when conceiving them to be exposed for sale in the open market. The purchaser of them in the open market would speedily experience their efficacy. I cannot bring myself to believe that these shares if sold in the open market would fetch a price of over 300*l.* each, yet that is what the House is about to decide.

It may be unfortunate for the Revenue that the Legislature has chosen a method of measuring value for estate duty purposes which may not in the present instance yield the

(1) [1920] A. C. 273, 305.

real value of these shares. But that is not your Lordships' concern. It is not the value of the shares as they were held and enjoyed by the deceased shareholders or their value as they are now held and enjoyed by their successors that is in question. It is simply and solely on their market value that the toll of estate duty is to be levied.

For the reasons which I have thus briefly indicated and which have been more fully developed by my noble and learned friend Lord Russell of Killowen and in the opinions of Slesser and Romer L.JJ. in the Court of Appeal my vote is for the dismissal of these appeals.

LORD ROCHE. My Lords, I have had the very great advantage of reading in advance the opinions prepared by the Lord Chancellor and by my noble and learned friend Lord Russell of Killowen. The case is one of manifest difficulty, but I have arrived at a definite conclusion that the appeals should be allowed for the reasons expressed by the Lord Chancellor.

I think it right, however, to refer to certain additional considerations which have led me to this conclusion.

The effect of the decision of the Court of Appeal in Ireland in *Jameson's* case (1) has been sufficiently stated by others of your Lordships. The question is whether that decision was right or was wrong, as the Court of Appeal (Lord Hanworth M.R. dissenting) in the present cases decided that it was. It is to be observed that the part of the judgment of Palles C.B. in *Jameson's* case (1) which went beyond the decision of the Court of Appeal in Ireland forms no part of the contention for the present appellants. They do not question the correctness of that part of the judgment and declaration of the Court of Appeal in Ireland which directs that in assessing the value to the notional purchaser regard is to be had to the provisions of the articles relating to alienation and transfer of the shares. It is said, however, that having gone so far it is illogical not to go further or to start earlier and pay regard to the articles rendering transfer to a purchaser who is a member of the public

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(1) [1905] I. R. 218.

Lord Roche.

impossible or unlikely at a price higher than that arrived at by virtue of art. 34, sub-cl. 14*a*. I am unable to agree with this contention for reasons which I will presently state. I would like first, however, to consider the results which seem to follow from the contrary view. If the price so arrived at (which for convenience I call the prescribed price) is the decisive price then, as it seems to me, however valuable a share may be intrinsically and however wide a range of disposition may have been allowed to a shareholder by the articles of a company, and however low a price may be prescribed upon a transfer outside that range of disposition, it follows that upon the shareholder's death the shares may pass to executors and then to persons appointed by will and be to them of great value, yet the values for estate duty purposes can be no higher than the prescribed price though it be entirely inadequate, or even negligible, in amount. It is said that though this may be so it needs legislation to prevent the happening of such a result. My Lords, with all respect to those who think otherwise, in my judgment the statute of 1894 has already provided against and prevented the happening of any such result. In this respect I agree with the Court of Appeal in Ireland that the language of the Act requires in a case where no actual sale is either possible or contemplated that a sale in the open market of a notional character is to be assumed. By a sale I mean and understand a transaction which passes the property in the thing sold. It must always be borne in mind that the Finance Act of 1894 is dealing with all descriptions of property and not expressly with shares, and I regard the word "sold" in s. 7, sub-s. 5, of this Act as having the same meaning as the word "sale" in the Sale of Goods Act, 1893: see s. 1, sub-s. 3, of that Act. Shares with many other kinds of property are, of course, not within the ambit of the Sale of Goods Act; but I am of opinion that for the purposes of the Finance Act, 1894, for shares to be sold the property in them, by which I mean the legal property, must pass. (Upon an actual sale there must be an actual passing of property. Upon a notional sale there must be a notional or assumed passing of property. In so far as the passing or transfer of property is thus notional or hypothetical, no restriction upon actual passing or transfer comes into question, and the article as to the prescribed price which is to rule under certain circumstances, though it is no doubt a constituent part of the bundle of rights which constitutes a share, does not, as I think, govern such a notional transfer so as to make the notional purchaser no more than a person who acquires an obligation to offer the shares to others at the prescribed price.

Two things are, however, said with regard to this matter. It is said that the statute does not require or impel to this conclusion. I am referring more particularly to the very closely reasoned judgment of Romer L.J. The passing in the open market of the interest of the testator in the Company which is described by the Lord Justice and is held by him to be sufficient to satisfy the conditions of s. 7, sub-s. 5, does not, as it seems to me, satisfy those conditions. It follows from that which I have said above as to my view of the nature of a sale and the meaning of the language of this section that I am unable to regard the transactions the Lord Justice there describes as sales within the meaning of the section. I should regard them as at most agreements for sale which, having regard to the subject matter and the articles, would have to be of a conditional character.

It is also said that the shares to be valued are shares which, owing to their essential nature as created or defined by the articles, are worth no more to a buyer than the prescribed price, and that they must be valued at that price. With all respect to those who hold this view I think with the Lord Chancellor that a great deal more passed on the deaths of the deceased shareholders than the obligation to transfer shares at the prescribed price. For example, the right to hold them and the right to leave them to others so that they in their turn might enjoy the prosperity of the company were rights of great value, and the notional purchaser must, in my opinion, be regarded as notionally acquiring on his purchase those rights amongst the other rights connected with and going to make up the shares.

It seems to me to be important to remind oneself that

s. 7, sub-s. 5, of the Act is simply a provision for estimating by means of an hypothesis the value of property which has passed otherwise than by an actual sale and transfer and may be incapable of so passing. But the section has to be applied and can be applied to all such cases. As to property which by its inherent or essential nature cannot be actually sold or transferred the application of the section was explained as I should like to explain it by my noble and learned friend, then Russell J., in the case of *In re Cassel*. (1) The learned judge says: "Next, how is the principal value of that property to be ascertained? The machinery provided by the Act is s. 7, sub-s. 5, supplemented to some extent by s. 7, sub-s. 8. That machinery does not exactly fit the present case, because from the personal nature of the provision, the benefit of it could not be sold at all; an outside purchaser would not obtain delivery of the goods. Nevertheless, the machinery must be made to fit, and I think it can be made to fit. It was made to fit in the Irish case of *Attorney-General for Ireland* v. *Jameson*. (2) The value cannot be ascertained by reference to market price, because there can be no market." The learned judge then proceeded to suggest or direct how a hypothetical market price should be arrived at. In substance the process suggested seems to have amounted to an estimation or assessment on general business lines of the value of the thing or property in question to a person who could enjoy it. The judgment of Finlay J. in the present case indicates that by similar processes often adopted and quite business-like the witnesses on both sides were able to provide him with proper material to arrive at a notional or hypothetical market price. Indeed, the fact that the decision of the Court of Appeal of Ireland in *Jameson's* case (2) had been acted upon for some thirty years until challenged in the present case is of itself evidence that the method of valuation then formulated was well capable of practical application. I have already given my reasons for holding that it was also the method required by the statute.

I concur in the opinion which is I think held by all your

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(1) [1927] 2 Ch. 275, 281.

(2) [1905] 2 I. R. 218.

Lordships that the property here in question was property falling under s. 1 of the Act of 1894. The contention to the contrary seemed to me not to be strongly pressed, and it is no disrespect to the very able argument for the respondents to say that the point appeared to be presented not so much for its inherent merits as for the opportunity it afforded for drawing attention to the fact that some of the shares left by one of the deceased shareholders would on the appellants' contention be valued for taxation at a higher price than the executors would receive for them. But as a matter of law regard cannot be had to the particular mode of disposition adopted by a shareholder and as a matter of fact the reflection presents itself to the mind that any apparent inequality in the result is due to the voluntary choice of the testator combined with the fact that though the material sub-section of the articles had been amended at some previous date, the shareholders had not chosen to amend it so as to keep pace with the prosperity of the Company. At the prescribed price the shares show a return of about 20 per cent. per annum and even at the price adopted by the learned judge of about 12½ per cent. per annum.

As to the figures, for the reasons given both by the Lord Chancellor and by Lord Russell of Killowen, I think no higher figures than the figures adopted by Finlay J. should be substituted for his figures, and the contention of the Crown in this respect fails.

My Lords, for these reasons I am for allowing the appeals so far as the restoration of the judgments of Finlay J. is asked for but not further.

In *Commissioners of Inland Revenue* v. *Crossman and Others.*

Order complained of discharged except so far as it dismisses with costs the cross-appeal of the appellants: Ordered that so far as it dismisses the cross-appeal of the appellants the said order be affirmed, and that the judgment of Finlay J. of December 21, 1933, *be restored: Ordered that the respondents pay to the appellants the*

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costs incurred by them in the Court of Appeal and also the costs incurred by them in respect of the appeal to this House: Ordered that the cause be remitted back to the King's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this judgment.

The same order, mutatis mutandis, was made in Sir Edward Mann's case.

Lords' Journals, March 27, 1936.

Solicitor for appellants: *The Solicitor of Inland Revenue.*
Solicitors for respondents: *Crossman, Block & Co.*

[HOUSE OF LORDS.]

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1936
May 21.

CENTRAL LONDON RAILWAY COMPANY	APPELLANTS;
AND	
COMMISSIONERS OF INLAND REVENUE	RESPONDENTS.
LONDON ELECTRIC RAILWAY COMPANY	APPELLANTS;
AND	
COMMISSIONERS OF INLAND REVENUE	RESPONDENTS.
METROPOLITAN RAILWAY COMPANY	APPELLANTS;
AND	
COMMISSIONERS OF INLAND REVENUE	RESPONDENTS.

Revenue — Income Tax — Railway Company — Additional capital — Debenture stock—Interest temporarily chargeable and charged to capital account—Right of company to retain tax on payment of interest—Profits and gains brought into charge to tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *General Rules Applicable to All Schedules, r.* 19, *sub-s.* 1; *r.* 21.

In 1930 a Railway Company was empowered to raise 850,000*l.* of additional capital by means of an issue of 5 per cent. redeemable debenture stock, and was authorized for five years to charge to capital account the interest accruing on all money raised thereby. In the year ending on December 31, 1930, the Company paid interest amounting to 4250*l.* to holders of this stock. Of that sum 2340*l.* 1*s.* 11*d.* was charged to capital account and 1909*l.* 18*s.* 1*d.* to revenue account. On paying the 4250*l.* to the holders of the new debenture stock the Company deducted income tax thereon and claimed to retain for their own purposes the amount so deducted :—

Held, that the sum of 2340*l.* 1*s.* 11*d.* had not been brought into charge to tax within the meaning of Rules 19 and 21 of the All Schedules Rules and that the Company could not retain the amount deducted from that sum.

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* *Present :* VISCOUNT HAILSHAM L.C., LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD ROCHE.

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1936

CENTRAL LONDON RY. CO. *v.* INLAND REVENUE COMMISSIONERS.

LONDON ELECTRIC RY. CO. *v.* SAME.

METROPOLITAN RY. CO. *v.* SAME.

Attorney-General v. *Metropolitan Water Board* [1928] 1 K. B. 833, commented on, but neither approved nor disapproved.

Orders of the Court of Appeal affirmed.

APPEALS from orders of the Court of Appeal.

The three appeals raised the same question. That of the Central London Railway Company was taken as typical. The facts are stated in detail in the judgment of Lord Macmillan and are summarized in the head-note.

The Company being assessed to income tax on the sum of 2340*l.* 1*s.* 11*d.* for the year ending on April 5, 1931, appealed against the assessment. The Commissioners for the Special Purposes of the Income Tax Acts affirmed the assessment, but at the request of the Company stated a special case for the opinion of the King's Bench Division of the High Court of Justice under s. 149 of the Income Tax Act, 1918.

The special case was heard by Finlay J., who held that the 4250*l.* must be taken to have been paid "wholly out of profits and gains brought into charge to tax" within the meaning of Rules 19 and 23 of the Rules applicable to all Schedules, and that the Company were entitled to retain the tax not only upon the 1909*l.* 18*s.* 1*d.*, as to which there was no dispute, but upon the 2340*l.* 1*s.* 11*d.* also, which was the matter in dispute.

The Court of Appeal (Lord Hanworth M.R. and Slesser and Romer L.JJ.) reversed this decision.

The Railway Companies appealed to this House.

A. M. Latter K.C., *W. T. Monckton* K.C., and *J. S. Scrimgeour* for the appellants.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown.

1936. Feb. 14. The House took time for consideration.

May 21. LORD BLANESBURGH. My Lords, I have had the advantage of reading in print the opinion which my noble and learned friend, Lord Macmillan, has prepared and which he is about to deliver. I entirely concur in that opinion and in the motion with which my noble and learned friend proposes to conclude.

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LORD MACMILLAN. My Lords, I am authorized by the Lord Chancellor, Lord Russell of Killowen and Lord Roche to indicate their concurrence in the opinion which I am about to deliver.

In these three appeals, which were heard together, substantially the same question is raised. I propose to follow the example of counsel in selecting as typical the case of the Central London Railway Company.

The facts may be briefly stated. In 1930 the Railway Company by a private Act passed in that session were empowered to raise 850,000*l.* of additional capital by means of an issue of 5 per cent. redeemable debenture stock. By s. 118 of the Act the Railway Company were authorized to charge to capital account for five years the interest accruing on all money raised by the issue. The debenture stock was duly issued and was purchased by certain issuing houses which in turn offered it for sale to the public.

In the year ending December 31, 1930, the Railway Company paid interest amounting to 4250*l.* to the holders of this stock. To the extent of 1909*l.* 18*s.* 1*d.* this sum was met out of interest on the unexpended proceeds of the issue. The balance of 2340*l.* 1*s.* 11*d.* was charged to capital account by the Railway Company in pursuance of the power to do so conferred by s. 118 of the Act. In the statutory accounts compiled and published by the Railway Company in compliance with the Railway Companies (Accounts and Returns) Act, 1911, for the year to December 31, 1930, this sum of 2340*l.* 1*s.* 11*d.* appeared as an item in Account No. 5, " Details of Capital Expenditure for Year ended December 31, 1930," where it was described as " Interest on 5 per cent. Redeemable Debenture Stock (1985/1995) during construction, less interest on unexpended proceeds."

The total interest paid by the Railway Company in the year 1930 on this and their other debenture stocks was just under 70,000*l.* For the fiscal year ending April 5, 1931, the profits or gains of the Railway Company as assessed for income tax purposes on the basis of their profits for the year to December 31, 1929, under Case I of Schedule D of the Income

Tax Act, 1918, amounted to over 280,000*l.* apart from an assessment of 7897*l.* under Schedule A and 4982*l.* of income received under deduction of tax. It will thus be seen that the total interest which the Railway Company paid to their debenture stockholders in 1930 was a much smaller sum than their assessed income for tax purposes for the year 1930–31.

On paying the 4250*l.* of interest to their new debenture stockholders in the year 1930 the Railway Company deducted the income tax thereon. They maintain that they are entitled to retain for their own uses the whole of the tax so deducted and are not bound to account for any part of it to the Crown. No question has been raised as to their right to retain the tax on the 1909*l.* 18*s.* 1*d.* of interest which they charged to revenue account. It is solely with the question of their right to retain the tax deducted from the 2340*l.* 1*s.* 11*d.* which they debited to capital account that the present case is concerned.

To answer this question your Lordships have once more to consider Rules 19 and 21 of the General Rules applicable to All Schedules of the Income Tax Act, 1918. These two Rules and the previous similar enactments which they replaced have on several occasions been the subject of examination by your Lordships.

The material words of Rule 19 are as follows :—

" 19.—(1) Where any yearly interest . . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest . . . but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest . . . . and the person liable to make such payment . . . . shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon . . . ." Rule 21 deals with the converse case of payments of interest " not payable, or not wholly payable, out of profits or gains brought into charge " and requires the payer in such cases to deduct tax when making payment and to deliver an account of the amount of tax so deducted to the Commissioners, who are thereupon directed to assess and charge the same against the payer.

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It will thus be seen that the Railway Company, in order to justify the retention of the tax deducted by them in paying the 2340*l.* 1*s.* 11*d.* of interest must show that it was " payable wholly out of profits or gains brought into charge to tax."

In ordinary course a company in preparing its profit and loss account, in order to ascertain the profit on its year's trading available for dividend, debits revenue with the interest which it has had to pay to its debenture holders who are among its creditors. But in compiling a return of its profits or gains for tax purposes a company is not permitted to deduct such interest. This is forbidden by Rule 3 of the Rules applicable to Cases I and II of Schedule D which enacts that " in computing the amount of the profits or gains to be charged no sum shall be deducted in respect of . . . . (*l*) any annual interest." Consequently, as the amount of the debenture interest is not a permissible deduction, it forms an element in the computation of the company's profits or gains for income tax purposes, on which it pays tax in the following year. But in a question with its debenture holders the company is entitled to deduct income tax from the interest which it pays to them and to retain the tax so deducted if the interest is " payable out of profits or gains brought into charge to tax."

The requirement that the company shall, at any rate primo loco, pay income tax in respect of what it has to pay out to its debenture holders is part of the general scheme of deduction of tax at the source. The qualified right which it possesses to recoup itself by retaining the tax which it in turn deducts in making payment to its debenture holders of the interest which it owes to them has been justified on various grounds, as for example that the company may be regarded as sharing its income with its debenture holders and, having paid the tax both on its own and on their share, is properly entitled on handing the debenture holders their share to deduct and retain the tax it has paid on that share. [cf. per Lord Davey in *London County Council* v. *Attorney-General.* (1)] The object is plainly to avoid double taxation of the same income.

But the language in which Rule 19 is expressed gives rise to much difficulty. The critical words, "payable out of profits or gains brought into charge to tax," manifestly cannot be read literally. If the expression "profits or gains brought into charge to tax" be taken to mean the assessed profits or gains on which the Company is charged to and pays tax in the year in which it makes the payment of interest, then the statutory requirement could never be fulfilled when the assessed profits are based on a return made by the company of its actual profits for the preceding year. It is only where interest is paid out of income taxed in the year of its receipt as, e.g., out of dividends taxed by deduction, that the payment can be made out of actual profits or gains brought into charge in the same year as that in which the payment of interest is made, for it is only in such a case that assessed income is based on the year of charge and not on the preceding year. An illustration will make the matter clear. Assume that the results of a company's trading for three consecutive years are as follows: First year, profits before payment of debenture interest, 10,000*l.*; second year, profits before payment of debenture interest, nil; third year, profits before payment of debenture interest, 10,000*l.*; and assume that the company has in each year to pay 5000*l.* of debenture interest. In the second year the company is assessed and charged to tax in respect of the 10,000*l.* profits of the preceding year, but it has got no actual profits out of which to pay its debenture interest. It certainly cannot pay its debenture interest out of the notional income which the Income Tax Acts attribute to it for tax purposes. A real payment cannot be made out of an imaginary fund nor can it be "payable" out of an imaginary fund. Assume that the company borrows from the bank 5000*l.* to enable it to pay its debenture interest. Is it then entitled to retain the tax which it deducts on making payment of interest to its debenture holders out of this borrowed money? Can the interest so paid be said to be "payable out of profits or gains brought into charge to tax"?

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(1) [1901] A. C. 26, 42.

Then take the third year. This time the company's assessed income for tax purposes is nil and it pays no income tax in

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that year. Yet it has ample profits out of which to pay its debenture interest and it does in fact pay it out of these profits under deduction of tax. Is the company entitled to retain the tax so paid as being " payable out of profits or gains brought into charge to tax " ?

Once, then, it is recognized that a real payment of interest cannot in fact be " payable " out of a notional assessed sum, it becomes necessary to find an interpretation of the words of the Rule which will not attribute to it so absurd a conception and which will bring the requirement which it prescribes within the realm of reality.

The difficulty of interpretation which I have just described is not discussed in the earlier cases. It seems to have emerged for the first time in the Courts in the case of *Attorney-General* v. *Metropolitan Water Board.* (1) The facts there resembled those in the illustration which I have already given. The Master of the Rolls (Lord Hanworth) thus poses the question (2) : Are the words " payable wholly out of profits or gains brought into charge," he asks, " to be interpreted as meaning ' profits or gains that have in fact actually been brought into charge ' or do they mean ' profits and gains that are subject to charge and will in due course become factors in the assessment of the liability of the appellants to the tax ' " ? This question he answers in favour of the first interpretation and so do Sargant and Lawrence L.JJ. But I do not find in any of the judgments an explanation of how a real payment can be made out of a notional income. Lawrence L.J. alone alludes to this difficulty and seeks to solve it by construing the words " payable out of " as equivalent to " properly chargeable against." " The meaning and effect of the rule," he says (3), " is that, in order to come within its scope, the annual payments must be of such a character that they can properly be charged against the taxable income—e.g., if the taxable income consists of the profits of a business the annual payment must be one that is charged upon the profits of that business, and not a payment unconnected with it."

(1) [1928] 1 K. B. 833. (2) Ibid. 842

(3) Ibid. 851.

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" Profits or gains brought into charge to tax," he concludes (1), " in r. 19 means the taxable and not the actual profits or gains in the year of assessment," and the anomalies which would result from any other reading are adduced in support of this conclusion. The general principle of the *Metropolitan Water Board* case (2) may be stated thus : Whenever in any year the amount of interest paid by the taxpayer does not exceed the amount of his profits or gains as assessed for income tax purposes for that year, then the interest paid in that year is, within the statutory meaning, " payable out of profits or gains brought into charge to tax," and the taxpayer is entitled to retain the tax which he deducts in paying the interest. There are qualifications of this principle, but that is the general effect of the decision.

My Lords, the result of applying this principle is that, to revert to my illustration, the Company would be entitled to retain the deducted tax in the second year but not in the third year, because in the second year its assessed income for tax purposes in that year exceeded the amount of the debenture interest paid in that year, while in the third year its assessed income for tax purposes was nil and therefore did not cover any part of the debenture interest paid. The incongruous result is that in the year in which the company paid its debenture interest out of its actual profits it is to be held disentitled to retain the deducted tax while in the year in which it had no profits out of which to pay its debenture interest, and had to borrow from the bank to enable it to do so, it is to be held entitled to retain the deducted interest. And this is justified on the ground that in the former year the debenture interest was not " payable out of profits or gains brought into charge " while in the latter year it was " payable out of profits or gains brought into charge," whereas the truth is that in neither year was the debenture interest in fact paid out of " profits or gains brought into charge," if those words mean the notional income attributed to the Company in each of these years for income tax purposes.

On the other hand it may be said that it is only fair that

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(1) [1928] 1 K. B. 852.

(2) Ibid. 833.

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in the second year in my illustration when the Company has made no actual profits but has had to pay tax on assessed profits of 10,000*l.* it should be entitled to recoup itself by retaining the tax which it has deducted in that year on paying its debenture interest. Moreover, if tax is deducted on paying interest in year A out of the actual profits of that year, those profits will not be assessed and become chargeable to tax till the following year B; consequently the tax payer will retain the tax deducted in year A but the Crown will have to wait till year B to get its tax on the profits out of which the interest was paid in year A.

The Legislature has in one instance at least shown itself not averse from such a result as I have just indicated. Sect. 7, sub-s. 1, of the Finance Act, 1931, dealing with Rule 20, which relates to the deduction of tax from dividends, enacts that that Rule shall " be construed as authorizing the deduction of tax from the full amount paid out of profits and gains of the said body which have been charged to tax or which, under the provisions of the Income Tax Acts, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period." In other words, tax may apparently be deducted from dividends (and retained) if the dividends are paid out of profits which have been, or will form, the subject of assessment and charge in some other year.

My Lords, it is remarkable that until the *Metropolitan Water Board's* case (1) this aspect of the problem presented by the words " payable out of profits or gains brought into charge to tax " does not seem to have been judicially noticed. All the cases which have reached this House were concerned with other questions. The leading case of *London County Council* v. *Attorney-General* (2) decided that " profits or gains brought into charge " meant the totality of the taxpayer's assessed income under all Schedules and not merely the portion of his income assessed under Schedule D. In the special

(1) [1928] 1 K. B. 833.

(2) [1901] A. C. 26.

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circumstances of the second *London County Council* case (1) it was held that the County Council was not entitled to reckon as " profits or gains brought into charge " for the purpose of Rule 19 the Schedule A assessment of premises belonging to and occupied by the County Council. In neither of these cases does the language employed by the noble and learned Lords convey any hint that they were thinking of payments of interest out of a notional fund. Thus in the first of these cases Lord Macnaghten (2) speaks of the interest being " in fact paid out of profits or gains ' brought into charge ' " ; and in the second of these cases the keynote of the speech of Loreburn L.C. is to be found in the sentence, (3) " This sum represents interest paid by the county council to the holders of Consolidated Stock which is not paid out of profits or gains brought into charge. It is paid out of rates." I cannot doubt that the Lord Chancellor was here contrasting actual payment out of actual rates with actual payment out of actual profits and gains.

The subsequent case of the *Edinburgh Life Assurance Company* v. *Lord Advocate* (4) decided that the requirement was satisfied if the amount of the profits and gains brought into charge was sufficient to cover the amount of the annuities disbursed, from which tax was deducted, and that it was not necessary, in order to justify retention of the deducted tax, that the annuities should be specifically paid out of these profits and gains. Then in *Sugden* v. *Corporation of Leeds* (5) and in *Corporation of Birmingham* v. *Commissioners of Inland Revenue* (6) the real point was whether the interest in question could properly and lawfully be paid out of the profits and gains brought into charge. Again I find that in the speeches of the noble and learned Lords in these later cases the language employed is appropriate to payment out of an actual rather than out of a merely notional fund. Thus in the former case Viscount Haldane L.C. (7) says that " In each case the question

(1) [1907] A. C. 131.
(2) [1901] A. C. 34.
(3) [1907] A. C. 134.
(4) [1910] A. C. 143.
(5) [1914] A. C. 483.
(6) [1930] A. C. 307.
(7) [1914] A. C. 491.

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is whether the annual payments taxed are actually and properly payable out of the profits." But the next sentence is a little disconcerting. "If they are," proceeds the Lord Chancellor, "these profits are treated by the Acts as diminished pro tanto in the hands of the owner, and he, having paid once for all on the whole, is thus entitled to retain for his own benefit the amount of tax he deducts from the annual payments before making them, as being tax that he has already paid." I confess to some difficulty in understanding how notional profits—if by "profits" is meant "assessed profits"—can be "diminished pro tanto in the hands of the owner" by payment out of actual profits. I am bound, however, to say that the implication of these cases is that the words "profits or gains brought into charge to tax" were there understood to refer to profits or gains as assessed to tax, although I do not think that attention was directed to the practical difficulty of paying actual interest out of a notional income. But it is unprofitable to scrutinize the language of these cases and unjustifiable to criticize it when once it is seen that they are not directly concerned with that difficulty.

My Lords, the present stated case and the judgment of the Court of Appeal naturally and properly proceed on the interpretation of Rule 19 which was adopted in the *Metropolitan Water Board's* case (1), that is to say, they treat as the relevant "profits or gains brought into charge to tax" in the year in which the interest in question was paid, the profits or gains of the Railway Company as assessed for tax purposes in that year. Thus the Commissioners in the stated case find that the Railway Company in that year "possessed taxed income amply sufficient to satisfy the payment in question." I find it difficult to understand how a notional income can be possessed, but I assume that what is meant is that in the year in which the interest was paid the Railway Company was charged with income tax on a sum in excess of the interest paid. In point of fact the actual profits of the Railway Company for the year 1930 as distinguished from their assessed profits for 1930–31 would also appear from the accounts

(1) [1928] 1 K. B. 833.

scheduled to the stated case to have been largely in excess of the debenture interest paid in 1930, but this circumstance was not adverted to and has throughout been treated as irrelevant.

At your Lordships' bar neither party challenged the soundness of the decision in the *Metropolitan Water Board's* case (1) and the House is not on this occasion required to review it. I am not to be taken as accepting it or as doubting it, for I should not like to come to any conclusion upon so difficult a point except after full argument. Your Lordships may well ask why I have thought it right to discuss so laboriously what it is not necessary to decide. My justification, if it be a justification, is that on the previous occasions when Rules 19 and 21 have been expounded in this House, the difficulty in their practical interpretation with which I have been dealing has not been in issue, and so far from any certain conclusion upon it having been expressed the matter has been left in an ambiguous position. I think it would be unfortunate if your Lordships were once more to ignore the existence of this difficulty or to leave it to inference or conjecture whether the principle of the *Metropolitan Water Board's* case (1) had or had not been adopted by this House. I am content if I have made it clear that the matter has not in my opinion been concluded by any judgment hitherto of this House and that so far as the present case is concerned the point is still left open for your Lordships' consideration should it arise on a future occasion. It is perhaps not too much to hope that in view of the practical importance of the matter the Legislature may see fit to put it beyond doubt, as they have sought to do in the case of Rule 20.

I now come to the special circumstances of the case in hand. Accepting the position that in the year in which the interest in question was paid there were " profits or gains " of the Railway Company " brought into charge to tax," in the sense of income assessed and charged to tax in that year, in excess of the amount of interest paid, there remains the question whether the interest was " payable " out of these " profits or gains " ?

(1) [1928] 1 K. B. 833.

The word " payable " is used in Rule 19, s. 1, and in Rule 21, s. 1; " paid " is used in Rule 19, s. 2, relating to patent royalties and in s. 36, sub-s. 1, which deals with interest on bank advances. There are passages in cases in this House in which " payable " appears to have been read in this connection as equivalent to " paid " or " may be deemed to have been paid." (See, e.g., per Lord Atkinson in *Sugden* v. *Leeds Corporation* (1)). For the present purpose the difference is in my view immaterial.

Now it is true that the Railway Company could lawfully, if they chose, have paid the interest in question out of their profits, and it is also true that the interest was paid out of a general banking account which contained sufficient profits (though these profits were not their assessed profits—a difficulty which still haunts me). But the interest was actually paid out of capital, and capital was the real source of payment. If the debiting of the interest were merely a matter of domestic accounting I should not be disposed to lay much stress upon it. But in my opinion it was much more than this. There was a deliberate decision to charge the sum in question against capital and not against revenue. That being so, I do not see how the Railway Company can claim to retain the tax on this interest paid out of capital when the right to retain tax is conditional on the interest being payable out of profits. If the interest had been paid out of actual profits the sum so paid would have figured in the Railway Company's return of profits to be charged to tax in the next year; but the 2340*l.* 1*s.* 11*d.* has never appeared and will never appear in any return by the Railway Company for tax purposes, for it is a payment out of capital. Consequently the Crown will never receive any tax either from the Railway Company or from the debenture holders in respect of the interest paid to the latter in 1930 if the Railway Company are not held accountable to the Crown for the tax which they deducted. The theory of the notional taxed fund covering the amount of the interest paid does not fit such a case, for the transaction is outside the region of profits whether notional or actual. By their own deliberate act the Railway

(1) [1914] A. C. 483, 499.

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Company have made this sum not payable out of profits. It is nothing to the purpose that theoretically the Railway Company might in some future year carry this sum of 2340*l.* 1*s.* 11*d.* back into profit and loss account as income. As to whether in the circumstances they could competently do so I express no opinion. But in the tax year in question they have chosen not to debit this sum to revenue account, and consequently have pro tanto prevented the diminution of the dividend fund in the distribution of which among their shareholders they have deducted tax and, as they were entitled to do, have retained the tax deducted.

My Lords, I do not think that the same sum can be utilized by the Railway Company to render them those two inconsistent services in the same tax year, so as to entitle them first to attribute the 2340*l.* 1*s.* 11*d.* to the payment of interest to their creditors and claim to retain the tax deducted therefrom as if it were paid out of revenue, and then, by debiting it to capital, to enhance the dividend fund and claim to retain the tax deducted from their shareholders on paying them their dividends. Whatever view be taken of the meaning of Rule 19 I do not think that the Railway Company can bring such a case within it.

The material facts, though of course not the figures, in the case of the London Electric Railway Company are identical with those of the Central London Railway Company's case and the same result must follow.

In the appeal of the Metropolitan Railway Company there is this distinction that the Company there are seeking to recover under s. 36 of the Act of 1918 income tax on certain sums of interest paid by them on money borrowed from their bank, which interest they debited to capital account. But for the present purpose this is a distinction without a difference, and no independent argument was submitted on this Company's behalf.

My opinion accordingly is that all three appeals should be dismissed and that the Order of the Court of Appeal in each case should be affirmed. The respondents should have their costs from the appellants, but as all three cases were heard together there should be a limitation as regards the hearing before your Lordships to one set of costs.

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Orders appealed from affirmed, and appeals dismissed with costs.

Lords' Journals, May 21, 1936.

Solicitors for appellants: *Bircham & Co.*
Solicitor for respondents: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

JOHN EMERY AND SONS . . . . APPELLANTS;

AND

THE COMMISSIONERS OF INLAND REVENUE . . . . RESPONDENTS.

H. L. (Sc.)*
1936
May 26.

Revenue—Income Tax—Profits and gains—Builders' business—Purchase of land—Sale of land and houses built thereon—Consideration consisting of money and ground annuals—Value of—ground annuals to be included in profits and gains—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D.*

A firm of builders carried on the business of purchasing vacant land, on which they built houses and then sold portions of the land with houses thereon. As purchase price of each house with its portion of land they demanded and received a sum of money and a " ground annual," i.e., a perpetual annuity of a fixed sum secured upon the house and ground. Ground annuals have at any given date an ascertainable value in cash, which is estimated at seventeen years' purchase :—

Held, that the realizable value of ground annuals created during the builders' financial year must be included among their profits and

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* *Present :* LORD BLANESBURGH, LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, and LORD MAUGHAM.

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gains for that year, and were chargeable to income tax under Sch. D.

Interlocutor of the Court of Session, 1935 S. C. 802, affirmed.

Appeal from an interlocutor of the Court of Session. (1)

Messrs. John Emery & Sons were builders whose business included the acquisition of vacant building sites, the erection of dwelling-houses thereon, and the sale of those dwelling-houses to purchasers. In a number of cases they created what are known in Scotland as ground annuals (which are similar in effect to rentcharges) over the houses and ground attached thereto, and then sold both the houses and the ground, taking payment of the purchase-money partly in cash and partly in ground annuals; in other words for a house and ground they received a sum of money and a ground annual, a perpetual annuity of a fixed sum secured upon the house and ground.

Ground annuals are a trustee security and have at any given date an ascertainable value in cash, apparently seventeen years' purchase.

The builders were assessed by an additional assessment to income tax on the sum of 541*l.* for the year ending on April 5, 1927. In computing this additional assessment 1624*l.*, being the realizable value of the ground annuals, amounting in the whole to 95*l.* 11*s.*, created during the appellants' financial year ending on December 31, 1925, estimated at seventeen years' purchase, was treated as a receipt to be credited to the account of the builders in ascertaining the amount of the profits of the builders' trade during that year. The builders contended that they had not realized, and could not realize, any profit on the ground annuals until these had been sold. The Commissioners for the Special Purposes of the Income Tax Acts held that it was not correct to include the realizable value of the ground annuals retained by the builders among the sums credited in the trading or profit and loss account, as this would involve charging income tax upon a profit which was not and might never be realized. They considered, however, that the ground annuals less the cost of creating them ought to appear as a profit in the builders' accounts,

(1) 1935 S. C. 802.

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and that for the purpose of ascertaining the true amount of this profit the expenses of creating the ground annuals should be deducted. At the instance of both parties a case was stated for the opinion of the Court of Session as the Court of Exchequer in Scotland.

The question was whether the realizable value of the ground annuals created and retained by the appellants ought to be added to the amount of the receipts credited in their accounts for the purpose of ascertaining the amount of their trading profits chargeable to income tax.

The stated case was heard by the First Division of the Court of Session before the Lord President (Normand), Lord Morison and Lord Fleming, who answered the question in the affirmative. (1)

The builders appealed.

The Dean of the Faculty (*James Keith K.C.*), *Raymond Needham K.C.*, *J. S. Scrimgeour* and *John Wheatley* for the appellants. Ground annuals are in the nature of an investment and are not taxable under Sch. D until they are realized. What was land has been exchanged for a sum of money, which is properly taxable, and heritable or real securities, which are not money or in the nature of money. In *Westminster Bank* v. *Osler* (2) the Government securities were found to be in the nature of cash, and the case was one of realization of assets. That is not so here.

[*Commissioners of Taxes* v. *Melbourne Trust, Ld.* (3), and *Rex* v. *Anderson Logging Co.* (4) were referred to.]

Sir Donald Somervell A.-G., *The Lord Advocate* (*T. M. Cooper K.C.*), *The Solicitor-General for Scotland* (*Albert Russell K.C.*), *R. P. Hills* and *T. B. Simpson* for the respondents were not called upon.

May 26. LORD BLANESBURGH. My Lords, notwithstanding the careful, full, and able arguments which your Lordships have heard from the Dean of Faculty and from Mr. Needham, I believe you are all of opinion that the

(1) 1935 S. C. 802.
(2) [1933] A. C. 139.
(3) [1914] A. C. 1001.
(4) [1926] A. C. 140.

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judgments in this case which were delivered in the First Division of the Court of Session stand undisturbed. They express my own view quite truly, and I do not feel that I could usefully add anything to them. This appeal must, I think, be dismissed, and I move your Lordships accordingly.

Lord Atkin. My Lords, I agree that this appeal should be dismissed, and for the reasons which have been given in the Court of Session.

Put quite simply, the position is that the appellants, who carried on the business of builders and dealing in real estate, entered into a transaction, or two transactions, by which they bought certain land, built houses upon it, and (without going into detail) disposed of their entire interest in the land for cash and for certain ground annuals. The position of the ground annuals seems to be this, that there was an obligation created in the several purchasers of the land by which the land became subject to what we in this country should call a rentcharge, which was not a personal obligation of the purchasers, but which was an annual charge which could be realized out of the land—a real burden upon the land. It is established that that obligation, or that right on the part of the appellants, was a realizable right, a market security in the sense of something which they could have realized at any moment by going into the market.

In these circumstances the case appears to me to be as plain as could be. It is a case where people have sold, in the course of business, a part of their stock for money plus money's worth—namely, the equivalent of a marketable security. The position in respect of ground annuals appears to me to be precisely the same as though they had sold the land for money plus an annuity or plus a bond conditioned for the payment of these particular sums, or for debentures under which those sums were payable annually ; it could be put in a great many different ways. However you put it, the result is not that they exchange part of their stock for a different kind of stock, but that they dispose of the whole of their stock for money plus money's worth. In those circumstances it seems to me on the plainest principles that the value of that marketable security has to be brought into account for the purpose of assessing the profits which they made in the particular years of trade. Those appear to be the principles upon which the Court of Session proceeded. It appears to me that they are right, and I concur in the motion which has been proposed.

Lord Thankerton. My Lords, I concur.

The first important point to observe in this case, to my mind, is that the transactions in question were admittedly part of the ordinary trading of this particular company; and secondly, as the learned Dean of Faculty admitted, that the transactions between the appellants as sellers of the houses and land, and the buyers of the houses and land, were completed transactions of sale. Then it needs to be observed: What did the appellants get as the consideration for that sale? They got two things: They got sums of money, and they got the obligations—the real burdens—in the nature of ground annuals which had been constituted by them in the course of the transactions. I have difficulty in seeing, even on Mr. Needham's argument, how in any real sense you can arrive at the cost of those ground annuals; and on the other hand it is perfectly clear, and must have been familiar to these appellants as to anybody else in Scotland, that ground annuals such as these have a well known market value and that they are constantly traded in, and in that respect they seem at least as good money's worth as any ordinary security quoted on the Stock Exchange. It does seem to me that the proper view of that part of the transaction is that in effect the appellants agreed to leave part of the price as a real burden on the property to the extent of the well known marketable value or thereabouts at the time. The main argument of the learned Dean of Faculty was that you could not bring this in until they realized it, as he admitted they could do, in the market. That in itself seems to me to amount at once to an admission that there was money's worth received at the time when the transaction of sale was completed, and if part of the price paid for the land and buildings consisted of money's worth, the marketable value of which asset is immediately ascertainable, I fail to see why that should not be brought into computation in the ordinary accounts of the trader for the purpose of bringing out the results of his year's trading. Finally, I may say that I agree generally with the opinions of the majority in the Court below, and particularly with that of the Lord President, and I concur in the motion which has been proposed.

LORD MACMILLAN. My Lords, your Lordships who have preceded me have so clearly set out the reasons which satisfy me that the judgment below was right that I have nothing to add except to express my agreement.

LORD MAUGHAM. My Lords, I will add only a very few sentences to what has fallen from your Lordships, with which I entirely agree.

I think Lord Fleming was right when in his opinion he used these words: " The taxpayers' counsel in the course of his argument said, and I assume he was right in saying, that, if a house had not been sold, the taxpayers would not have been obliged to enter its value in their accounts as an item received by them." The emphasis there is, however, on the word " value." Lord Fleming did not, I think, mean that nothing ought to be entered in their accounts, and it would no doubt have been right in that case to enter the houses which were not sold at cost or market value, whichever was the lower. Then he goes on to say: " But the point of the case, to my thinking, is just that the houses were sold and that the taxpayers parted completely with the right of ownership in them." It is precisely for that reason that there is no ground for putting an artificial cost of production, so to speak, on the ground annuals which have been obtained as the result of the sale of this property, since the ground annuals have a definite market value which can readily be ascertained. I agree with what has been said, that the right of ownership has, by the transaction in question, been converted into a different type of property—namely, ground annuals.

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On those grounds I am satisfied that the opinions of the learned judges of the Court of Session are perfectly correct.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, May 26, 1936.

Solicitors for appellants: *Kenneth Brown, Baker, Baker, for Weir & MacGregor, S.S.C., Edinburgh, and Sellar & Christie, Glasgow.*

Solicitor for respondents: *The Solicitor of Inland Revenue, for The Solicitor for Scotland of the Board of Revenue.*

[HOUSE OF LORDS.]

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1936
July 14.

COUNTY COUNCIL OF THE PARTS OF LINDSEY, LINCOLNSHIRE . . . APPELLANTS;

AND

MARY MARSHALL, WIFE OF LEWIS ALEXANDER MARSHALL . . . RESPONDENT.

Negligence—Maternity home—Puerperal fever—Ineffective steps to disinfect—Failure to warn incoming patient—Patient contracting disease—Liability of County Council.

The plaintiff had been a patient in a maternity home administered by a committee of a county council, under the provisions of the Maternity and Child Welfare Act, 1918, managed by a matron, and advised by the medical officer and assistant medical officer of health for the county. The patients were attended by their own medical advisers. On July 4, 1933, a patient in the home, one Mrs. F., became ill and was removed to a hospital and was found to be suffering from puerperal fever. The matron and the two medical advisers of the home were informed of this and certain steps were taken to disinfect the home and the staff. On July 12 the plaintiff was admitted to the home. After a few

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* *Present:* Viscount Hailsham L.C., Viscount Sankey, Lord Russell of Killowen, Lord Macmillan, and Lord Wright.

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days she developed puerperal fever. She brought an action against the county council to recover damages for negligence and breach of duty on the part of the council and those for whom they were responsible.

The jury found that those responsible for the administration of the home were guilty of breaches of duty in admitting new patients before having ascertained whether any of the staff were carrying infection, and without informing applicants for admission, or their medical advisers, of the case of Mrs. F., and of the steps taken in consequence thereof to rid the staff of infection. They awarded damages 750*l*:—

Held, by Viscount Hailsham L.C., Viscount Sankey, Lord Macmillan and Lord Wright, dubitante Lord Russell of Killowen, that the plaintiff was entitled to recover, on the ground that there was evidence on which the jury might find that the defendants ought to have known that the home was dangerous and had failed to take reasonable steps to prevent damage to the plaintiff from the danger.

Hillyer v. *Governors of St. Bartholomew's Hospital* [1909] 2 K. B. 820 distinguished.

Order of the Court of Appeal [1935] 1 K. B. 516 affirmed.

APPEAL from an order of the Court of Appeal. (1)

The facts are stated in detail in the judgment of the Lord Chancellor; they may be summarized as follows:—

The appellants, defendants in the Courts below, were the authority empowered to provide the Cleethorpes Maternity Home under the provisions of the Maternity and Child Welfare Act, 1918.

The respondent, plaintiff below, was the wife of Lewis Alexander Marshall. She brought an action for damages sustained by her through contracting puerperal fever whilst a patient in the Cleethorpes Maternity Home.

In January, 1933, the plaintiff called at the nursing home, saw the matron, and told her that she expected to be confined on or about July 4. It was arranged that she should have a private ward at four guineas a week and that she should be attended by her own doctor.

On July 12, at 11.30 P.M., the plaintiff's husband telephoned to the nursing home to say that his wife's confinement was approaching. Being invited to come, the plaintiff and her husband arrived at the home shortly before midnight. The home was full, and she agreed to go into Ward 7, where there were two other patients. She was delivered on the following day. A few days later she was found to have contracted puerperal fever.

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(1) [1935] 1 K. B. 516.

Shortly before July 12, namely, on June 30, a Mrs. Franklin had been a maternity patient in the home. She was delivered of a child on July 1. On July 4 she had a temperature of 104° which rose to 105°, and she was removed to the Grimsby and District Hospital, where the case was diagnosed as one of puerperal fever. On July 5 that diagnosis was reported to the matron of the nursing home and to Dr. Stott, the Assistant Medical Officer of Health for the County and Medical Superintendent of the home, who in turn reported it to Dr. Campbell, the Medical Officer of Health for the County. Dr. Stott gave directions for disinfecting the wards, clothes and so forth; the staff had had disinfectant baths and were using gargles.

The action was tried before Lawrence J. and a special jury at Lincolnshire Assizes. The jury in answer to a number of questions put to them by the learned judge found that it was a breach of duty on the part of the defendants not to refuse admission to the home to new patients from July 5 onwards; that from July 4 to July 20 swabs should have been taken from the whole staff immediately on the report of Mrs. Franklin's case; that the plaintiff or her husband or her medical adviser ought to have been informed of Mrs. Franklin's case, and that the plaintiff's illness flowed from these breaches of duty. They awarded 750*l.* damages, and the learned judge entered judgment for the plaintiff for that amount.

On an appeal by the defendants to the Court of Appeal Greer and Roche L.JJ. (Maugham L.J. dissenting) affirmed the judgment of Lawrence J.

The defendants appealed to this House.

June 11. *E. W. Cave K.C.* and *Walker Carter* for the appellants. A hospital authority is not responsible for want of skill imputed to its medical officers in the discharge of their professional duties: *Hall* v. *Lees* (1); *Evans* v. *Mayor of Liverpool* (2); *Hillyer* v. *St. Bartholomew's Hospital.* (3) The authority does not guarantee that the wards shall be free from infection, it only contracts that all reasonable means shall be taken to keep them free therefrom. When the authority retains the services of competent and fully qualified medical advisers and nurses, and has provided fit and proper apparatus and appliances for the treatment of patients, it has performed its obligation at law and is not responsible for negligence of doctors, matron, or nurses while acting in the exercise of their professional functions and knowledge. Each of the matters complained of fell within the sphere of the medical advisers of the appellants. If they had done more or less than was directed by those experts, their act or default would have been at their own peril. It was not for the matron or the nurses to decide for themselves that the precautions directed by Dr. Stott and Dr. Campbell were insufficient and to act accordingly, or to apprise the respondent of their suspicions, or to refuse to admit patients in the face of the doctors' permission, or for the matron of her own motion to take swabs from the whole of the staff on the report of Mrs. Franklin's case, when Dr. Stott had not considered it necessary to do so.

June 12. *Norman Winning* and *Geoffrey Smallwood* for the respondent. The home was in fact dangerous for women seeking admission. The appellants knew or ought to have known that it was dangerous. They failed to take reasonable means to avoid damage from the danger. They might have avoided it in the first instance by taking swabs from the throats of every nurse who had attended on Mrs. Franklin and acting on the information obtained by those means, but they failed to do this. They might have warned or informed the respondent, or her husband, or Dr. Thompson, of Mrs. Franklin's case, so as to give the respondent the opportunity of going elsewhere for her confinement; but this was not done. The case therefore falls within the principle

(1) [1904] 2 K. B. 602.
(2) [1906] 1 K. B. 160.
(3) [1909] 2 K. B. 820.

of *Indermaur* v. *Dames* (1), which has been approved in this House in *Mersey Docks and Harbour Board* v. *Proctor* (2).

[It was not necessary to contend that the duty imposed by law upon the appellants was higher than that defined in *Indermaur* v. *Dames*. (1) Those who prepare premises for the reception of others, and receive payment for the accommodation, might be held to warrant that the premises are as free from danger as reasonable skill and care can make them : *Francis* v. *Cockrell*. (3)]

Cave K.C. in reply relied upon the judgment of Maugham L.J. in the Court of Appeal. (4)

The House took time for consideration.

July 14. VISCOUNT HAILSHAM L.C. (read by VISCOUNT SANKEY). My Lords, this is an appeal from an order of the Court of Appeal affirming the judgment of Lawrence J. in favour of the respondent for 750*l*. damages pursuant to the verdict of a jury in her favour.

The appellants own and control a maternity home known as the Cleethorpes Maternity Home, which is carried on by them under statutory powers. Cleethorpes Maternity Home is a comparatively small three-storey building containing in all sixteen beds for patients. Some of the beds are in single rooms and are known as "private wards," and for these a charge is made of four guineas a week. The remaining beds are in public wards and the charge for admission to these is two guineas a week.

The patients in the home are attended by their own doctors ; the appellants provide a nursing staff, three of whom are certified midwives. The appellants administer the home through their Maternity and Child Welfare Committee, which consists partly of members of the appellant Council and partly of co-opted members. That committee has a sub-committee which meets at Cleethorpes every two months for the management of the home. The committee are advised in the management of the home by a Dr. Campbell, who is County Medical Officer of Health, and a Dr. Stott, who is an Assistant Medical Officer of Health for the County and the medical superintendent of the home. Both these doctors described their duties as purely administrative, by which I understand them to mean that they performed no clinical duties and took no part in the treatment of any of the patients.

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(1) (1866) L. R. 1 C. P. 274 ; (1867) L. R. 2 C. P. 311.

(2) [1923] A. C. 253, 259.

(3) (1870) L. R. 5 Q. B. 184, 501 in Cam. Scacc.

(4) [1935] 1 K. B. 516, 532.

In the month of January, 1933, the respondent interviewed the matron at the home with a view to admission for confinement in the following July. She explained that the date at which she expected to be confined was about July 4, and she arranged with the matron that she should have a private ward at a cost of four guineas a week and that she should be attended by her own doctor.

On June 30, 1933, a Mrs. Franklin was admitted to the home. On July 4 Mrs. Franklin developed a high temperature and her doctor diagnosed her as suffering from appendicitis, and she was removed by ambulance to Grimsby General Hospital. On her removal the ward in which she had been lying and the nurses who had been in contact with her were disinfected in accordance with the ordinary routine when a temperature case arises. On arrival at the hospital it was ascertained that Mrs. Franklin was in fact suffering from acute puerperal fever.

Puerperal fever is a very dangerous and highly infectious disease. On July 5 the authorities at the home were informed by Grimsby General Hospital of their diagnosis and thereupon a further disinfection took place. Normally, the proper course to adopt on the appearance of a case of puerperal fever is for swabs to be taken of the throats of all persons who have been in contact with the patient in order that it may be ascertained by bacteriological examination whether any such person is a carrier. In Mrs. Franklin's case no swabs were taken, as it was thought that the disinfection on July 4 would have rendered that precaution useless for the purpose of ascertaining whether a carrier was present.

On July 9 a Mrs. Fleming was admitted to the home; she developed a temperature of 100·6° on the following day after her confinement and a similar temperature again on July 11. Her case therefore became notifiable as a case of puerperal pyrexia, and in fact it was subsequently ascertained that there were present in her case the germs which cause puerperal sepsis.

On the evening of July 12 the plaintiff was very near her confinement, and accordingly her husband communicated by telephone with the home and was instructed to bring his wife. On their arrival late that night they were informed that there was no private ward available and that she would have to go into one of the other wards. After some hesitation they decided that the plaintiff should go into an ordinary ward on the understanding that she would be removed to a private ward as soon as possible. No information was given to the plaintiff or her husband or her doctor at any time before her admission about the case of Mrs. Franklin or of Mrs. Fleming, and nothing was said to any of them to indicate that there had been any recent case of infection at the home. On July 13 the plaintiff's child was born ; on July 16 four other patients in the home developed puerperal fever ; on July 17 the plaintiff herself developed the fever. She was ultimately removed to an infirmary and suffered a very severe attack of the disease. On July 17 Dr. Campbell and Dr. Stott decided to close the home against any further admissions.

The case was heard before Lawrence J. and a special jury at Lincoln Assizes in June, 1934. A series of questions were left to the jury, which with their answers are as follows :—

(1.) Was the contract to supply a private room subject to there being one available ?—No.

(2.) Was the contract to supply such a private room on July 4, or when she presented herself ?—When she presented herself.

(3.) Was it varied by the plaintiff agreeing to enter a public ward ?—No.

(4.) Was it a breach of duty not to refuse admission to the home to new patients from July 5 onwards ?—Yes.

(5.) Was there any breach of duty in the administration of the home from July 4 to July 20 ?—Yes.

In what respect ?—Swabs should have been taken from the whole of the staff immediately on the report of Mrs. Franklin's case.

(6.) Was it a breach of duty not to inform the plaintiff or her husband or her medical adviser of Mrs. Franklin's case ?—Yes.

(7.) Did the plaintiff's illness flow from the breach of duty specified—(*a*) in question 4 ?—Yes ; (*b*) in question 5 ?—Yes ; (*c*) in question 6 ?—Yes.

(8.) Damages, 750*l.*

On these findings judgment was entered for the respondent for 750*l.* with the costs of the action. The appellants appealed to the Court of Appeal. In that Court it was unanimously held that there was no evidence to support the answers of the jury to the first three questions. Maugham L.J. further held that there was no evidence to justify the answers to the remaining questions ; the other two members of the Court held that the answer to the fifth question afforded no cause of action because the responsibility was shown to lie with Dr. Stott and not with the defendants, but they held that there was evidence to justify the answers to the sixth and seventh questions and that these answers justified the judgment in favour of the plaintiff.

It is not very clear what view the majority of the Court of Appeal formed about the answer to the fourth question. Greer L.J., with whose judgment Roche L.J. agreed, expressed the opinion that the decision as to the closing of the home rested with Dr. Campbell and Dr. Stott, and that in taking their decision they were not acting as servants of the defendants ; but at the conclusion of his judgment Greer L.J. said that there was evidence on which the jury could find that the matron was negligent in admitting the plaintiff to the home when she knew, or ought to have known, that there was danger to the plaintiff if so admitted. At the hearing at your Lordships' Bar, counsel for the respondent did not challenge the decision of the Court of Appeal upon the answers to the questions as to contract, and the result of the appeal, therefore, must depend upon the question whether there was evidence to justify the findings of the jury with regard to the later questions. I think these answers must be read together, and that it is a reasonable interpretation of those answers that the jury must have considered that it was unsafe to receive new patients into the home after it had been ascertained that Mrs. Franklin was suffering from puerperal fever, without ascertaining whether or not there was a carrier in the staff by taking swabs from all the nurses who had been in contact with Mrs. Franklin; and that if new patients were admitted before that fact was ascertained their doctors should have been informed of the facts, in order that they might decide whether or not their patients should be allowed to enter the home, and what precautions against infection should be taken if they were admitted. The questions for your Lordships to consider are (i.) whether there was evidence to justify these findings of fact, and (ii.) if there was such evidence, whether those facts constitute an actionable wrong by the appellants as against the respondent. It was not disputed that if those questions were answered in favour of the respondent, the damages as found by the jury were occasioned by the breach of duty.

Medical evidence was called on both sides at the trial. I propose only to remind your Lordships of such evidence as bears directly on the question of the taking of swabs. The plaintiff's own doctor, Dr. Thompson, said that after a case of puerperal fever the first step was to swab all throats and that the matron and staff should not be allowed to attend other patients until it had been ascertained that the swabs gave a negative result. Dr. Stott said that he would find out by swabs taken from the nurses' throats whether there was a carrier there, that there was always the possibility of a carrier, and that for that reason swabs ought to be taken. Dr. Allison, an eminent gynæcologist, who was called for the appellants, said that swabs should be taken from the noses and throats of all contacts, including nurses and friends, and sent for bacteriological examination, and all contacts up to forty-eight hours after the woman's child was born. In view of that evidence, it seems to me that the jury were amply justified in thinking that without taking swabs there was a grave risk that a carrier might be present, and that until that risk had been eliminated it was a dangerous thing to admit a new patient to the home. Counsel for the appellants explained that the reason why swabs were not taken was that when Mrs. Franklin was removed from the home on July 4 the nurses were disinfected in the ordinary routine, and that when it was ascertained on July 5 that the case was one of puerperal fever, the disinfection on the previous day rendered the taking of swabs impossible. The jury might well have reached the conclusion that, while those circumstances explained the reason why swabs were not taken, they afforded no justification for admitting new patients until it had been ascertained whether there was a carrier in the home. They may well have thought that if the appellants chose to admit new patients into the home, without having been able to ascertain whether a carrier was present, they ought at least to have warned those patients, or their medical advisers, of the facts so that they might decide for themselves whether they would face the risk and, if so, of the precautions they would take to avoid the risk. Dr. Thompson, for example, was emphatic in his view that, had he known the facts, even if his patient had been admitted into the home, he would have insisted that no one who had been in contact with Mrs. Franklin should be allowed to take any part in her nursing. I am therefore clearly of opinion that there was ample evidence to support the conclusions of fact and that the first question must be answered in favour of the respondent.

But it was contended on behalf of the appellants that even if there was negligence in continuing to admit new patients, and in not informing them of the facts, the responsibility rested upon Dr. Campbell and Dr. Stott and the defendants were not liable in law. I am unable to accept that view of the law. The appellants were carrying on a maternity home and they were inviting prospective mothers to make use of the home for the purpose of their confinement. In those circumstances they owed a duty to those whom they invited into the premises to make those premises reasonably safe, or if there was any hidden danger of which they or their agents were or ought to have been aware, to give the persons so invited due warning of its existence. The appellants are, of course, a corporation and they can only act by agents. They appointed as their agents to manage this home the sub-committee of the Maternity and Child Welfare committee, and that committee in turn looked to Dr. Campbell and Dr. Stott to advise them upon medical questions. But the duty is laid by law upon the appellants and they were responsible in law for the mistakes of their agents. I can see no difference in principle between the employment of a doctor to advise on medical questions and the employment of any other skilled person to advise upon other questions. In my judgment, the jury were amply warranted in finding that the home was dangerous, for the reasons which I have indicated, and that the plaintiff should have been warned of the danger, and it is no excuse in law for the appellants to say that they were misled by the mistakes of the agents whom they employed.

Reliance was placed by the appellants upon a series of cases in English and Scottish Courts, in which it has been decided that where a Public Authority carries on a hospital that Authority is not responsible to patients for mistakes in medical treatment or in nursing, provided that they have taken reasonable care to appoint competent doctors and nurses. The respondent challenged the correctness of these cases and referred your Lordships to the recent case of *Powell* v. *Streatham Manor Nursing Home* (1) to show that your Lordships' House gave judgment against the proprietor of a nursing home where the nurses employed by him had been guilty of negligence. It is true that the correctness of the earlier decisions is still open to review in your Lordships' House. But that review should only take place in a case in which the point is directly raised; the question as to the correctness and as to the limits of the doctrine is obviously one of great importance, both to those who are charged with the responsibility of carrying on hospitals and nursing homes, and to the public who make use of such hospitals and homes.

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(1) [1935] A. C. 243.

In my judgment, those questions are not raised by the facts in this case and nothing that I have said must be taken as throwing any doubt upon the correctness of those decisions. The principle upon which those cases were determined is well stated in *Hillyer* v. *the Governors of St. Bartholomew's Hospital* (1) in the judgment of Kennedy L.J. The learned Lord Justice expresses the opinion that the legal duty which the hospital authority undertakes towards a patient, to whom it gives the privilege of skilled surgical, medical and nursing aid within its walls, is an inference of law from the facts, and he holds that the responsibility of the hospital authorities is limited to undertaking that the patient shall be treated only by experts, whether surgeons, physicians or nurses, of whose professional competence the Governors have taken reasonable care to assure themselves, and further that those experts shall have at their disposal for the care and treatment of the patient fit and proper apparatus and appliances. It is obvious that, if that is the correct view of the relationship between the hospital authorities and their patients, there is no breach by the authorities of such duty by reason of the fact that a competent doctor or nurse is guilty of negligence or lack of due care or skill in their treatment of a patient. My Lords, it seems to me that this principle can have no application to the facts of this case. The appellants were not providing any medical attendance for the respondent and there is no complaint that the nurses were guilty of any lack of skill or care in attending her. The complaint is that the appellants invited the respondent to a home, which they ought to have known was in a dangerous condition, and that they did not inform her of the facts which constituted the danger. In my judgment, there is nothing in the principle of the cases on which reliance is placed to absolve the appellants from their responsibility for that breach of duty. The reason why the hospital authorities were held not liable in *Hillyer's* case (1) is because the doctors and nurses were held not to be acting as their agents or servants in the giving of medical treatment. There is no

(1) [1909] 2 K. B. 820, 828, 829.

trace of any authority in those cases or elsewhere for the view that where a corporation acts by an agent its liability for the mistakes of that agent is any less where the agent is a medical man than where the agent belongs to any other profession or calling. It follows that in my judgment the appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

VISCOUNT SANKEY. My Lords, this is an appeal by leave of the Court of Appeal from an order of His Majesty's Court of Appeal (England) dated February 8, 1935, ordering the verdict given and judgment directed to be entered for the plaintiff on the trial of the action before Lawrence J. to be affirmed.

The judgment of the Court of Appeal was a majority one, Greer and Roche L.JJ. being for affirming the judgment and Maugham L.J. for entering judgment for the defendants.

The action was one for damages alleged to have been sustained by the plaintiff by reason of her contracting puerperal fever whilst in a maternity home at Cleethorpes belonging to the defendant County Council. It was admitted on behalf of the defendants that the plaintiff contracted puerperal fever while she was in the home.

About January, 1933, the plaintiff called at the nursing home, saw the matron, and told her that her doctor had recommended her to go to the home to be delivered of her baby, which she expected on July 4, that she wanted a private ward, and that her own doctor would attend her. It is unnecessary to state in great detail the other facts of the case, but I take such as are necessary for my opinion from the judgment of Maugham L.J. They are as follows :—

On July 12, at 11.30 P.M., the plaintiff's husband rang up to say that she was expecting approximate delivery. Some one on the telephone told them to come along, and she arrived with her husband shortly before midnight on that day. She was delivered on the following day, and a few days later she was found to have contracted puerperal fever, and thereby suffered substantial damage.

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Viscount Sankey.

Now a Mrs. Franklin had been a patient at the home. She was admitted on June 30 and delivered on July 1. On the morning of July 4 she had a temperature of 100·4°, and suffered from pain.

This was a case of puerperal pyrexia, which might be due to many causes, puerperal fever being one of them. She was being attended by her own doctor, Dr. Deighton. He diagnosed the case as one of appendicitis. In the evening the fever rose to 105° and Dr. Deighton, after attending the case with his partner, who agreed with his diagnosis, had the patient removed to the Grimsby and District Hospital. This was duly reported to Dr. Stott and the disinfection precautions of fumigation and spraying, usual in every case of puerperal pyrexia, were taken on that day. On the patient reaching the hospital the case was diagnosed by Dr. Chapman as one of puerperal fever. On July 5 that opinion was reported to the matron of the home and by her to Dr. Stott and by him in turn to Dr. Campbell. Dr. Stott called himself at the home and gave detailed instructions on the 5th as to what was to be done as regards disinfecting the wards, the clothes, and so forth. The whole staff had already had disinfectant baths and were gargling their throats with disinfectant. Nurse Siddle, who had delivered Mrs. Franklin, was put off her duty for forty-eight hours and came back on July 8. It is important to observe that Dr. Stott was quite satisfied with the precautions taken, and directed special precautions to be taken as regards the Gray Ward, where Mrs. Franklin had been while she had a temperature, and it was kept closed till July 11. He never suggested closing the home to further patients and has given evidence that he thought such a course, as also the giving of a warning to any one, was quite unnecessary.

On July 12 another patient, Mrs. Fleming, who had been admitted on the 9th and delivered shortly afterwards, had a temperature which was diagnosed by her doctor, a Dr. Montgomery, as due to erosion of the cervix. The case was reported to Dr. Stott and the usual disinfectant precautions were taken as in every case of temperature over 100·4°, whatever its cause. The illness of Mrs. Fleming was never diagnosed at the time as a case of puerperal fever, and the fever was a not unusual symptom, and Dr. Stott saw nothing alarming about it. It is, however, possible that it was a case of mild puerperal fever.

On the evening of July 12, at about 11.30 P.M., the plaintiff's husband rang up the home and said she was coming in at once and she and her husband arrived at the home a little before midnight. She said that she was expecting a private ward, but she was told there was not a private room available, and after some conversation she agreed to share a room with other patients and was put in Ward 7 (the separation ward) with Mrs. Fussey and Mrs. Laidlow, who had both arrived on that day. The home was then full. The plaintiff was expecting immediate confinement and was taken to the labour room, the name given to the surgical room where all confinements take place, but was brought back when it became apparent that the birth was not quite imminent. Her doctor was Dr. Williamson, but he was not available, and his locum tenens, Dr. Thompson, delivered her on the night of the 13th, the matron and another nurse (Holmes) being present. After confinement she was removed to the Grant Ward, where Mrs. Fussey and Mrs. Laidlow were by that time. By that time and on July 15 everything was normal in the home. Mrs. Towle and Mrs. Cudmore, who had been in the ward with Mrs. Franklin, had developed no symptoms of fever or illness. The matron, Dr. Stott and Dr. Campbell did not think that any risk of infection from Mrs. Franklin was left after the various measures of disinfection. That unfortunate lady, however, died on the 13th in Grimsby Hospital; the jury was plainly taking the view that she died of puerperal fever and there was ample evidence to justify that view. On the morning of the 16th Mrs. Fussey and Mrs. Laidlow developed temperatures and in the afternoon Mrs. Johnson and Mrs. Hardy also did so. Mrs. Fussey and Mrs. Laidlow were taken out of the Grant Ward, leaving the plaintiff alone there. It was a Sunday. The matron first spoke to Dr. Montgomery, who was visiting a private patient. She then telephoned to Dr. Stott, who was out, and then to Colonel Stephen, a consulting obstetrician appointed by the defendants. He came and recommended that the four ladies mentioned should be taken by ambulance to the Scarthoe Road Infirmary. On the 17th the plaintiff had a temperature of 102·4°. Her own doctor, Dr. Brown, a partner of Dr. Williamson, came in and gave instructions as to her treatment. Dr. Stott and Dr. Campbell both came on the morning of the 17th and it was decided to close the home to fresh patients for the time, for the events of the 16th had showed that they had to deal with an outbreak of puerperal fever. The plaintiff had contracted the disease and was removed on the 20th. It may be added that between the time Mrs. Franklin was delivered and the plaintiff was delivered there were seventeen women delivered at the home. Of these women five, including Mrs. Franklin, had puerperal fever, and Mrs. Fleming may possibly have had it. Two died, Mrs. Franklin and Mrs. Fussey (and her baby). Ten were free from any illness.

These being the facts, the trial judge left a number of questions to the jury. Question 4: Was it a breach of duty not to refuse admission to the home of new patients from July 5 onwards? The jury answered "Yes." (5.) Was there any breach of duty in the administration of the home from 4 July to 20 July? If so, in what respect? Answer: "Yes. Swabs should have been taken from the staff immediately after the report of Mrs. Franklin's case." (6.) Was it a breach of duty not to inform the plaintiff or her husband or her medical adviser of Mrs. Franklin's case? Answer: "Yes." (7.) Did the plaintiff's illness flow from a breach of duty under Question (4.), (5.) or (6.)? Answer: "Yes." (8.) Damages. Answer: "750*l.*"

Now the Court of Appeal were unanimous in thinking that there was no evidence upon which the jury could answer questions 4 and 5 in the affirmative, Greer L.J. stating, before dealing with the last two questions: "I think I ought to deal with the learned judge's decision that the defendants were responsible for any negligence which might be established on the part of Dr. Stott." The learned Lord Justice then discussed the case of *Evans* v. *Mayor of Liverpool* (1) and said that in his judgment the decision of Walton J. in that case applied to the present case. He added that Walton J.'s decision was approved in the Court of Appeal in *Hillyer* v. *St. Bartholomew's Hospital*. (2) We had the advantage of having these cases cited to us, together with the case of *Hall* v. *Lees*. (3)

The learned counsel for the appellants in my view correctly summed up the law as laid down in those cases in the following way: "In the case of a nursing home conducted by local authorities, the local authority is not responsible for negligence of doctors, matron or nurses while acting in the exercise of their professional functions and knowledge." He added that each of the matters found against the defendants in the present case were matters involving exercise of professional knowledge or skill, and that, even if it can be said it was an act resulting from the exercise of purely administrative duty, there was no evidence upon which the jury could find a breach of duty or negligence.

Speaking for myself, throughout the case I have felt considerable embarrassment flowing from the fact that the Court of Appeal found that there was no evidence to support the verdict of the jury under question 4, but there was evidence on which they could come to the conclusion they did in answer to question 6. But as the learned counsel for the respondents told us that he did not rely upon the answer to question 4, it is unnecessary to pursue that matter further. The appeal in your Lordships' House must, therefore, depend upon the position caused by the evidence and the answer to question 6. In these circumstances it is not necessary for me to go at length into the decisions to which I have already referred. I should like, however, to point out that great care must be taken in considering those decisions and bearing in mind the consequences which flow from a breach of contract and the consequences which flow from a tort. In some cases

(1) [1906] 1 K. B. 160.
(2) [1909] 2 K. B. 820.
(3) [1904] 2 K. B. 602.

it may make no difference whether the action is laid in contract or tort, as in the familiar one of a passenger travelling by a train and being injured by the negligence of the railway company, he can rely on the contract to carry safely or upon the tort caused by the negligence of the railway company in not carrying him safely.

In *Hall* v. *Lees* (1) I doubt whether any general principle was involved. The question really turned upon the documents —what was the contract? Was it a contract to nurse or a contract to provide competent nurses? *Evans* v. *Liverpool* (2) was approved and followed in *Hillyer* v. *St. Bartholomew's Hospital* (3), which may be said to establish the doctrine that a hospital authority is not liable for the negligence of a doctor while acting in the exercise of his professional functions and knowledge. Indeed, Farwell L.J. puts it rhetorically as an example, that when once the doors of the operating theatre are closed upon them for an operation the doctors and nurses present in the operating theatre are no longer the servants of the authority. I am far from saying that this is not the proper legal result, but I should add that it may be necessary to delimit the frontiers of liability. There may be some cases where a doctor, a matron, or a nurse is clearly doing an act in his or her professional capacity. There may be other cases where a matron or nurse, and as I think even a doctor, may be doing an act not in his or her professional capacity. It may be that on one side of the line you may have acts which are clearly professional for which a local authority would not be liable; on the other side, acts which are clearly administrative or of some other character than professional which might make the authority liable; and there may be difficult cases on the border line. But it is not necessary to discuss or lay down the law on these subjects, having regard to the answer of the jury to question 6. The jury have found that it was a breach of duty not to inform the plaintiff, or her husband, or her medical adviser of Mrs. Franklin's case. Can that be supported either in law or fact?

(1) [1904] 2 K. B. 602.
(2) [1906] 1 K. B. 160.
(3) [1909] 2 K. B. 820.

In cases of this character, so far as they are based on negligence, the plaintiff has to show that she contracted the disease by reason of negligence of persons for whose acts the defendants were responsible, and this requires proof that the plaintiff has suffered injury by reason of a breach of duty amounting to negligence on the part of some person or persons employed at the home, and consequently that the acts amounting to breach of duty were acts done as the servant to or agent of the defendants. What then is the duty cast upon a Local Authority in a case like the present? In my view it is their duty to provide a home reasonably fit and to provide proper accommodation in it, and if there have been circumstances known to them which might render the home not so fit, it is their duty to warn a person proposing to enter the home of such circumstances. There is no absolute warranty that the home shall be fit. The question whether there has been negligence or breach of that duty is one for the jury on proper evidence. Was there in this case evidence upon which the jury could find as they did? I think there was. First it is suggested that it was quite impossible to give the lady any warning when she arrived at midnight on July 12. If the only fact had been that she arrived as an emergency case, without any previous notice, different considerations might arise, but those are not the facts in the present case. The plaintiff had given notice that she was coming in months before, and that she was coming in early in July, and upon July 5 the matron knew that Mrs. Franklin was suffering from puerperal fever, and there was no reason why notice should not have been sent then.

It may then be asked to whom ought they to have sent notice? To have sent notice to a woman herself in such circumstances might have made her unduly nervous, but it was open to the jury to find, as I think they must have found, that notice ought to have been sent to her husband or to her medical adviser, and they probably did come to the conclusion, from the evidence of her doctor, that if such notice had been given she would never have come to the home at all.

As Roche L.J. put it in his judgment: "I confess, however, that when I consider what in comparable circumstances would be expected, and would I think generally be done by private hosts and by those responsible for providing nursing homes, and even by agisters and livery stable-keepers in the case of infectious animal disorders, I cannot regard the difficulties," i.e., the difficulties of giving notice, "as serious, still less as insuperable. Speaking for myself, I should think that communication to the doctor or husband or both was the proper course, and that any time would do—the earlier the better—before admission. With regard to the difficulty the plaintiff would have in this, I should imagine it could have been overcome by the adoption of the method employed by countless women in all stations of life—namely, confinement in her own home and attendance by a doctor and a private or district nurse, or, in an extreme emergency, by an experienced friend or neighbour."

Again, it might be asked: Would a Local Authority always have to give notice of a case of puerperal fever having occurred in their home? That again is a question of fact for the jury. There may be cases where it was said that there was no evidence upon which the jury could come to the conclusion that there had been circumstances which made the home not reasonably fit. For example, supposing twenty years before the patient arrived there had been a case of puerperal fever, but that there had never been another case since. Or, again, supposing there had been a case of puerperal fever, say, two or three months before the plaintiff came in, and supposing that the Local Authority had then shut up the house for some weeks and had it fumigated, it might well be that there was no evidence upon which a jury could find that there were circumstances which rendered the home not reasonably fit for its purpose or that the failure to warn a person who proposed to enter the home was negligence or a breach of duty. But everything depends upon the facts of the case, and I cannot help thinking that, having regard to the incident of Mrs. Franklin, and all the surrounding circumstances connected with it, it was a case where the jury could rightly and properly find that it was a breach of duty and neglect on behalf of the defendants not to give the plaintiff notice of Mrs. Franklin's case. It seems to me they took the risk of things being all right, and they were not entitled to take that risk.

Then it was said that they are covered by the professional advice of the doctors that fumigation had been properly resorted to. In my view that does not affect the liability under this head. I agree with the majority of the Court of Appeal in thinking the matron ought to have given warning, and I further think that the doctors ought not necessarily to have given notice themselves to incoming patients, but to have caused notice to be given.

For these reasons I think the appeal should be dismissed. I need not refer to the application for a new trial. It was not seriously pressed, nor should it succeed.

Lord Russell of Killowen. My Lords, as this case was presented in the Courts below, I would have said that not one of the findings of the jury in answer to the 4th, 5th and 6th questions was supported by any evidence : and I would have agreed with the judgment of Maugham L.J.

Your Lordships however think that the findings of the jury read together may be interpreted as meaning that there was negligence on the part of those who represented the defendants at the home, in admitting the plaintiff without first informing her doctor that in fact no swabs had been taken from the staff.

If the answers can be so interpreted and there was any evidence upon which the jury could come to that conclusion, this appeal must fail.

For myself I feel grave doubts whether this is the true interpretation of the jury's answers, but I am not prepared to say that it is not a possible interpretation. I feel the same doubts as to the existence of any evidence to support such a finding. The majority of your Lordships however have been able to detect some such evidence in the shorthand notes ; and in view of this fact I find it difficult, if not impossible, to say that the jury were entirely without materials upon which to base their finding.

In the result I am prepared to concur, but without enthusiasm, in the motion proposed.

LORD MACMILLAN. My Lords, the appellants are responsible in law for the due administration of the institutions which they carry on in the performance of their statutory duties or in the exercise of their statutory powers. This responsibility extends to the actings of those through whose agency they perform their duties or exercise their powers. Consequently if the respondent's unfortunate experiences in the Cleethorpes Maternity Home were due to the negligence of the appellants' agents or servants in the conduct of the home the appellants are answerable. It must be shown that the appellants owed a duty to the respondent, that the agents whom the appellants employed to perform that duty on their behalf were negligent in the discharge of it, and that the injury suffered by the respondent was directly attributable to such negligence.

The respondent was received into the appellants' maternity home when, as the event proved, it was not safe owing to the existence of infection. It was undoubtedly owing to the presence of that infection that the respondent contracted puerperal fever in the home. These facts by themselves are not sufficient to impose liability on the appellants to compensate the respondent. The appellants do not warrant that their maternity home is safe. It must further be shown that the appellants through their agents or servants acted negligently in the matter of the admission of the respondent to the home while it was in an infected condition. If the appellants' medical officers or matron thought that there was any risk of infection in the premises—and I include, of course, any risk of infection from the nurses and attendants in the premises—I think it was plainly their duty to warn the respondent or her husband or her doctor of the possible danger. They had taken what they conceived to be adequate precautions to ensure disinfection and no doubt honestly believed that there was no danger in admitting the respondent and consequently no necessity to give any warning. There was, however, evidence to the effect that the precautions taken were not adequate and that the medical officers and matron ought to have known of the element of danger present, and ought to have given warning of it. If the jury believed this evidence, as they appear to have, they were entitled to find that there had been negligence on the part of the appellants' representatives in admitting the respondent to the home without any warning. There was also evidence that if such warning had been duly given the respondent would not have sought admission to the home.

The appellants' main defence was that the question whether the home was or was not free from infection was a medical question upon which they were not competent to pronounce and upon which they had necessarily to rely on their professional advisers. If the latter advised wrongly, the appellants claimed that they were under no liability for the consequences of such wrong advice. Now I do not doubt that in matters relating to the medical or surgical treatment of patients in a home or hospital the lay administrators of the institution cannot be held liable for the mistakes or negligence of the physicians or surgeons whom they employ, provided that they have been selected with due care. There are authoritative decisions to that effect. But the present case does not relate to a matter of professional treatment. The question was one of the safety of the premises for the admission of the public, and while the appellants may well say that they could not themselves as laymen know whether there was any danger of which intending inmates should be warned, nevertheless I do not think that they can escape responsibility for the negligently mistaken view of their medical officers and matron on this point, any more than they could escape responsibility for a dangerous state of the drains in the home merely because their sanitary inspector had reported them to be in order. The appellants have a duty to take by themselves or by their officers all proper steps to keep the premises safe for the admission of the public, or if they have not done so either to exclude the public altogether or at least to warn them of the danger.

There being evidence on which the jury could find that there

Lord Macmillan.

was negligence on the part of those for whom the appellants are responsible in not knowing, as they ought to have known, that in admitting the respondent to the home they were exposing her to the risk of infection and consequently that there was negligence in not giving warning of that risk, I am of opinion that the verdict of the jury, so far as upheld by the Court of Appeal, must stand.

LORD WRIGHT (read by LORD MACMILLAN). My Lords, I agree with the opinion of the Lord Chancellor. I shall merely add a few observations out of respect to those who have taken a different view.

The case on behalf of the appellants is that in the matters in question the appellants owed no duty to the respondent, and that accordingly the findings of the jury must be set aside. I disregard the further contention that in any case the findings were without any evidence or any evidence on which a reasonable jury could find as they did. No doubt the evidence was conflicting and no doubt the jury might have come to a different conclusion on the evidence. But in my opinion there was reasonable evidence on which they could find as they did. I am here only dealing with the answers to questions 4 and 6 and also to question 7, which deals with damage.

Now it is true that the answers 4 and 6 and each of them cannot stand if the duty which the answers presuppose did not exist between the appellants and the respondent. Whether the duty did or did not exist is a matter of law, which the Court must decide on all the relevant facts.

Answer 4 I understand to mean that according to the view of the jury the appellants by themselves or their agents knew or ought to have known that the home was not in a fit state to receive the respondent and involved a risk of infection because the premises or fittings or the staff or all of them had not been properly disinfected and hence she should not have been admitted.

Answer 6 I understand to mean that in any case the appellants by their servants or agents knew or ought to have known of the risk of infection, and should have warned the

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appellants' doctor (and perhaps herself or husband) of the risk, so that the doctor and the respondent could decide whether to take the risk. The jury obviously believed the evidence of the respondent, her husband and her doctor, that, if warned, they would not have entered the appellants' home but would have sought accommodation elsewhere for the birth.

As to answer 4, it might at first sight seem that on general principles there was a duty on those who operate a home such as that of the appellants for the reception of patients in order to be delivered, to exercise due care and skill by themselves and their servants to avoid receiving patients into their home so long as there was danger, of which they knew or ought to have known, of infection of puerperal fever, a serious disease which is extremely infectious and liable to be attended with grave and perhaps fatal consequences. I do not put the obligation as high as that of a warranty; but the gravity of the risk must emphasize the gravity of the precautions proper to be taken to guard against it. The existence of the duty seems to follow from the general rules of the law of negligence. Now that the forms of action have been abolished and it is recognized that negligence is an independent tort, it is not necessary to consider if the duty is to be based on contract (there was a contract in this case between the appellants and the respondent) or whether it is based simply on the relationship between the parties, that is, on the respondent placing herself in the home and the appellants undertaking to receive her. I merely refer to this matter because of certain arguments addressed to your Lordships. I shall only add that though there was consideration in the facts of the case, the position would have been the same if the service had been voluntary. The duty arises from the fact that the respondent entrusted herself to the appellants' care and custody as regards hospital accommodation and nursing, which the appellants were holding themselves out as prepared to furnish; similarly a surgeon who undertakes a gratuitous operation owes in performing the operation a duty of care and skill to the patient.

Answer 6 deals with a duty which though analogous in principle is narrower in content. The appellants, who knew or ought to have known of the risk, should have given the respondent or her doctor the opportunity of deciding whether or not to run the risk. If they knowingly took the risk, they could not as against the appellants have complained of the consequences of their own act and volition. If the answer to question 6 is supported, it is enough by itself to justify the judgment for the respondent.

But on behalf of the appellants it has been contended they are free from all liability in the matter, because the decision not to close the home, or not to warn the patient before she was received, depended on questions of medical or hygienic skill and knowledge, in regard to which the appellants or their sub-committee were not competent to form an opinion, but were necessarily guided by their professional advisers, Dr. Campbell, the County Medical Officer of Health, and Dr. Stott, the Assistant County Medical Officer of Health, who was medical superintendent of the home, and the matron and nurses, about all of whom no reflection was made as to their competence.

In general, those who engage in an undertaking the actual conduct of which involves expert scientific or professional skill and knowledge which the principals do not possess, cannot escape liability to outsiders who are injured by the negligence of those who advise or act for the principals, on the ground that they, as principals, are laymen and must necessarily be guided by, or act through, experts. Most big concerns are managed by committees of business men who neither have nor profess expert knowledge: if this contention were to prevail in general, it would practically go to nullify liability of principals for their agents over a large area. But it is claimed that this is so in regard to hospitals and similar institutions. That immunity cannot be claimed by such institutions because of their character as such. I need only quote a short passage from the judgment of Farwell L.J. in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1): " It is now settled that a public body is liable for the negligence of its servants in the same way as private individuals would be liable under similar circumstances, notwithstanding that it is acting in the performance of public duties, like a local board of health, or of eleemosynary and charitable functions, like a public hospital."

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(1) [1909] 2 K. B. 820, 825.

But the appellants rely on the statement of the duty of the hospital to the patient in the facts of that case as applying to the circumstances of the present case. It is important to observe exactly what that case decided. The plaintiff underwent an operation, a surgical examination under an anæsthetic, at the hospital; there was evidence sufficient to be submitted to a jury "if the defendants could, in point of law, properly be held responsible to the plaintiff for the injury caused to him by negligence on the part of the surgeons and nurses engaged in the surgical examination to which the plaintiff submitted in the hospital of which the defendants are governors." I quote from the language of Kennedy L.J. (1) The Lord Justice, dealing there with a surgical operation, held that the defendants were not responsible for negligence of the experts, surgeons, physicians or nurses in the actual conduct of the operation, because in such matters they could not be deemed to be the servants or agents of the hospital authorities. But he went on to limit the immunity in this way (2): "The governors of a public hospital, by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care, do, I think, undertake that the patient whilst there shall be treated only by experts, whether surgeons, physicians or nurses, of whose professional competence the governors have taken reasonable care to assure themselves; and, further, that those experts shall have at their disposal, for the care and treatment of the patient, fit and proper apparatus and appliances." The Lord Justice later (2) states by way of distinction his view "that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like."

(1) [1909] 2 K. B. 828.

(2) Ibid. 829.

Lawrence J. in directing the jury in this case did, I think, correctly apply the principles laid down by Kennedy L.J.: he directed the jury "that the administration of the home was done by the County Council through a sub-committee who employed Dr. Stott and Dr. Campbell and the matron and the nurses as their servants, and that they are responsible for the neglect and default of those persons in the carrying on of the home." As I read the direction as a whole, I think that it amounts to a direction that the duty of seeing that the home was reasonably fit to receive the patient or in the alternative of warning the patient of the risk, was a matter of administration, for which the home was responsible; it was not like the actual conduct of a surgical operation or the prescribing of medicines or medical treatment, but was analogous to the provision of fit and proper apparatus and appliances or the supplying of proper food.

In my judgment the facts in this case are to be distinguished from those in *Hillyer's* case. (1) It is not necessary to express here any opinion one way or the other about the correctness of that decision. That can be reserved until it comes, if it ever does, before this House: and the same may be said of *Evans* v. *Liverpool Corporation* (2), which presents some differences from *Hillyer's* case. (1) Nor is it necessary to consider what difficulties may arise in delimiting the respective frontiers of ministerial or administrative duties on the one hand and matters of professional care or skill on the other hand, if it ever becomes necessary to apply the distinction which Kennedy L.J. draws.

In the present case the duty of the appellants is in my opinion not different in principle from their duty if (for instance) there was good reason to suspect that the drains of the home were defective and involved a risk of causing typhoid to the patients. In that case the appellants would have to be guided by sanitary and hygienic experts and would be responsible for their negligence: similarly if a defective ceiling was negligently left unrepaired so that it collapsed and injured a patient in her bed. In these and many such cases the duty of the

(1) [1909] 2 K. B. 820.

(2) [1906] 1 K. B. 160.

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appellants is not different in essence from that of a householder who has to take care that persons invited into her house are not negligently exposed to danger, or at least are duly warned of the risk, as, for instance, if there has been scarlet fever in the house, so as to involve risk of infection. In the present case it was well known that puerperal fever was both infectious and dangerous. To apply *Hillyer's* case (1) to facts like these would involve a great extension of the rule which the Court of Appeal there laid down and indeed would contravene the limitations which Kennedy L.J. placed upon it. Such a result would be very hard on the respondent: there would be no one whom she could sue for the damage she has suffered whereas the plaintiff in *Hillyer's case* (1) could sue the surgeon for misfeasance.

It is not necessary to add that in all these matters not only the matron and nurses but the medical officers were in my opinion the servants of the appellants, as Lawrence J. ruled. The fact that the appellants necessarily relied on their knowledge and judgments does not the less render them the appellants' agents to carry out the responsibility which rested on the appellants as operating the home.

Powell v. *Streatham Manor Nursing Home* (2) was referred to, but no question of law as to responsibility was raised in that case and it may for this purpose be disregarded.

I agree in the motion proposed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, July 14, 1936.

Solicitors for appellants: *Taylor, Jelf & Co., for Eric W. Scorer, Lincoln.*

Solicitors for respondent: *Maude & Tunnicliffe, for James Young, Grimsby.*

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(1) [1909] 2 K. B. 820.

(2) [1935] A. C. 243.

[HOUSE OF LORDS.]

H. L. (Sc.)* FERRIER . . . . APPELLANT;

1936
July 16.

AND

THE SCOTTISH MILK MARKETING BOARD . . . . RESPONDENTS.

Agricultural marketing—Milk marketing scheme—Cost of operating scheme—Contributions—Liquid market—Manufacturing market—Effort to equalize prices—Ultra vires—Scottish Milk Marketing (Approval) Order, 1933 (*S. R. & O.* 1933, *No.* 479/*S.* 26), *s.* 24, *sub-s.* 2—*Agricultural Marketing Act,* 1931 (21 & 22 *Geo.* 5, *c.* 42).

By s. 24, sub-s. 2, of the Scottish Milk Marketing Scheme (Approval) Order, 1933, made under the Agricultural Marketing Act, 1931, the Scottish Milk Marketing Board were empowered to recover from registered producers (with certain special provisions hereafter mentioned in favour of producer-retailers) such contribution assessed at an amount per gallon on milk sold by them as the Board might consider necessary to cover "the costs of operating the Scheme."

Producer-retailers were directed to pay into a fund a contribution per gallon equal to nine-tenths of the amount provided by s. 24, sub-s. 2, as a debt due from them to the Board and recoverable accordingly.

There are two markets for the sale of milk: (1.) the primary or liquid market, and (2.) the secondary or manufacturing market. The quantity of milk produced in Scotland largely exceeded the demands of the primary market. The Board fixed the standard price of milk for both markets and endeavoured to restrict competition in the primary market. Purporting to act under s. 24, sub-s. 2, of the Scheme they diverted to the secondary market, where it could only fetch a reduced price, a proportion of the milk produced in the area of the Scheme, and claimed from a producer-retailer a monthly contribution on the footing that the loss they suffered by selling in the secondary market milk which might have been sold in the primary market was a "cost of operating the Scheme":—

Held, that sums representing the difference between the actual price received by the Board for milk sold by them in the secondary market and the price which would have been received if the milk had been sold in the primary market were not "costs of operating the Scheme" within the meaning of s. 24, sub-s. 2, thereof.

THIS APPEAL from an interlocutor of the First Division of the Court of Session (1) was in effect an appeal from *Scottish Milk Marketing Board* v. *Barron* (2), a decision of the Second Division of the Court of Session with three consulted judges pronounced on July 20, 1934.

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* *Present:* LORD BLANESBURGH, LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, and LORD MAUGHAM.

The respondents (hereinafter called "the Board") are a body administering the Scottish Milk Marketing Scheme, approved by s. 1 of the Scottish Milk Marketing Order, 1933, under power in that behalf conferred by s. 1 of the Agricultural Marketing Act, 1931. By s. 19 the Act is, with certain immaterial modifications, made applicable to Scotland.

There are two main outlets for the sale of milk: (1.) the primary or liquid market, in which milk is sold for consumption, and which is little affected by foreign competition, and (2). the secondary or manufacturing market, in which milk is sold for manufacture into cheese, butter, condensed milk and other products, and in which there is strong foreign competition. The quantity of milk produced in Scotland is far in excess of the demand from the primary market.

The Board fixes the minimum standard prices for both markets, and generally speaking the operations of the Board tend to restrict competition in the primary market and to maintain a higher level of prices in that market.

The appellant, defender in the Court of Session, was a registered producer under the Scheme. Registered producers fall into two classes: (1.) Ordinary producers, who sell their milk to middlemen for distribution to domestic consumers in the primary or liquid market or for manufacture in the secondary or manufacturing market: these producers are required by the Board to pay the proceeds of their sales into a fund administered by the Board; (2.) A class consisting of (*a*) producer-retailers, i.e., those who produce milk and retail it themselves to domestic consumers in the primary market and collect from their customers the proceeds of the sales; (*b*) producer-wholesalers; and (*c*) producers of certified milk. Registered producers of this class are not required to pay the proceeds of their sales into the fund. The appellant was a producer-retailer.

(1) (1935) S. C. 673.

(2) Unreported.

By s. 24, sub-s. 2, of the Scheme, the Board may recover from registered producers of the second class, i.e., those the proceeds of whose sales are not required to be paid into the fund, such contribution as the Board may consider necessary to cover " the costs of operating the Scheme." The contribution is to be " assessed as an amount per gallon on all the milk sold by the registered producers, and, subject to the provisions of paragraph (*a*) of sub-s. 2 of s. 25 and the corresponding provisions of ss. 26 and 27 hereof," (which apply to producer-wholesalers and producers of certified milk) " every registered producer shall be required to contribute the same amount per gallon." By s. 25, sub-s. 2 (*a*), which applies to producer-retailers, it is provided that these producers shall " pay into the fund a contribution per gallon equal in amount to nine-tenths of that provided in sub-s. 2 of s. 24." The contribution, unless otherwise determined by the Board " shall be a debt due by them to the Board and shall be recoverable by the Board accordingly."

Purporting to act under this sub-section the Board made a monthly computation of what they alleged were " costs of operating the Scheme," and claimed to recover the amount from the registered producers by means of a levy based upon the quantity of milk sold by each of these producers. From the defender they claimed 292*l.* 4*s.* 10*d.* for the months December, 1933, to July, 1934, inclusive.

The defender in his answer to Condescendence 4 averred that the Board, in making their computation of the amount of the contributions alleged to be due from him, had included in each monthly computation, as a " cost of operating the Scheme," a sum representing the difference between the actual price which they received for milk disposed of by them in the secondary market and the price which, as they alleged, they would have received if the milk had been disposed of in the primary market. He went on to aver that in each of the said months the selling price in the primary market (which was fixed by the Board) exceeded the price in the secondary market. He contended that the sums representing the difference were not costs of operating the Scheme within the meaning of s. 24, sub-s. 2, and that the Board in including these sums in assessing the contributions had acted illegally and ultra vires.

In answer to these averments the Board explained that the selling price each month in the primary market was only secured by the Board diverting to the secondary market, where it could only obtain a reduced price, a proportion of the milk produced in the area of the Scheme; and that the cost to the Board of this diversion was a "cost of operating the Scheme."

The First Division of the Court of Session, following the decision of the majority of the seven judges in the Second Division in *Scottish Milk Marketing Board* v. *Barron* (1), held that the "costs of operating the Scheme" included the sum of 292*l.* 4*s.* 10*d.*

The defender appealed to this House.

May 15. *A. P. Duffes K.C.* and *J. G. McIntyre* for the appellant (both of the Scottish Bar).

J. C. S. Reid K.C. and *J. L. Clyde* for the respondents (both of the Scottish Bar).

May 18. The House took time for consideration.

July 16. LORD BLANESBURGH. My Lords, I have had the privilege of reading the opinion which has been prepared by my noble and learned friend Lord Thankerton, and which he is about to pronounce. I agree entirely with the conclusion at which my noble and learned friend has arrived and with the reasons which he gives in support of it.

LORD ATKIN (read by LORD THANKERTON). My Lords, I have had the advantage of reading the opinion about to be delivered by my noble and learned friend Lord Thankerton with which I agree, and only add a few words of my own to state an additional reason for the conclusion to allow the appeal at which I believe all your Lordships have arrived.

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(1) Unreported.

The fallacy, as I venture to think it, in the reasoning of the majority of the learned judges in *Barron's* case (1) is not unfamiliar. They have found in the Act and Scheme a central purpose, equality of price between milk producers, and have adapted their construction of the words of the Scheme to carry out this object. My Lords, this Procrustean method has the almost inevitable result of stretching the meaning of words to fit the bed so constructed. For my part I share the doubt expressed by the late Lord Murray, whose loss to judicature lawyers both in England and Scotland deplore, as to whether either the Act or the Scheme aimed at equality between all producers. There appear to be excellent reasons why at any rate some members of the two classes of produce retailers and producers of certified milk might claim that they control their own market and are in no way dependent upon or assisted by the existence of a Milk Marketing Board.

But leaving this aside the question always must be what do the relevant words mean. I cannot bring myself to think that the words " to recover a contribution necessary to cover the costs of operating the scheme " include a contribution for the purpose admitted in the fourth condescendence and answer in the present case. " Costs of operating the scheme " in ordinary language must mean expenditure or liability which if not recouped would fall upon the Board ; they cannot include in my opinion sums which represent no expenditure or liability of any one but which are levied upon all milk producers for the sole purpose of increasing a fund to be distributed amongst some of the producers. They are not costs of obtaining a fund but levies to increase the fund. I find myself in agreement with the judgment of the late Lord Murray on this point. I adopt the motion suggested by my noble and learned friend.

LORD THANKERTON. My Lords, in the present action the respondents, who are the Board administering the Scottish Milk Marketing Scheme, seek to recover a sum of 292*l.* 4*s.* 10*d.* from the appellant, as the contributions alleged to be due by

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(1) Unreported.

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him, as a registered producer under the Scheme, in respect of the months from December, 1933, to July, 1934, inclusive. The appellant disputes his liability on the ground that the contributions so claimed include an element which is illegal and ultra vires of the respondents.

The Scottish Milk Marketing Scheme was constituted in 1933 under the Agricultural Marketing Act, 1931, and came into operation on May 26, 1933. The regulated product is milk produced within the area of the Scheme, and registered producers under the Scheme fall into two classes : (1.) producers, who may conveniently be called ordinary producers, the proceeds of the sale of whose milk are required to be paid into the fund administered by the Board, and (2.) producer-retailers, producer-wholesalers and producers of certified milk, the proceeds of the sale of whose milk are not required to be paid into the fund. The appellant is a producer-retailer.

There are two main outlets for the sale of milk ; the primary or liquid market, in which milk is sold for consumption, and which is little affected by foreign competition, and the secondary or manufacturing market, in which milk is sold for manufacture into cheese, butter, condensed milk, etc., and in which there is strong foreign competition. The quantity of milk produced in Scotland is far in excess of the demand from the primary market. The milk produced by the ordinary producers is sold under the directions of the Board, whether in the liquid or the manufacturing market, and the proceeds of these sales are paid to the Board and credited to the fund. The milk produced by the second class of registered producers, which includes the appellant, is practically all sold in the liquid market by the producers to their own customers, and the proceeds of such sales are retained by the producers ; any surplus production by them will be sold subject to the directions of the Board, and the proceeds of such sales will be paid to the Board. There is no question of any such surplus in the case of the appellant, and, while such cases may occur, I find it unnecessary to take them into account for the purposes of the present question.

The proceeds of sales thus paid to the Board may be said to form a pool, the free proceeds of which, after certain deductions, are divided among the ordinary producers, according to the number of gallons of milk thus sold by each producer and irrespective of whether the particular producer's milk in fact has been sold for liquid or manufacturing purposes.

The Board fixes the minimum standard prices for both markets, which apply to all registered producers, and, generally speaking, it is clear that the operations of the Board, among other things, tend to restrict competition in the liquid market and to maintain a better level in prices in that market. The appellant, who is able to dispose of all his milk in the liquid market among his own customers, retains the proceeds free from the pooling effects of the Board's administration of the fund.

The respondents seek recovery of the sum sued for in terms of s. 24, sub-s. 2, of the Scheme, which provides as follows :—

" 2. Contributions by registered producers to the Fund.—The Board shall retain from the proceeds of the sale of the regulated product which are required to be paid into the fund, and shall recover from registered producers the proceeds of the sale of whose supplies of the regulated product are not required to be paid into the fund, such contribution as the Board may from time to time consider necessary to cover the costs of operating the Scheme and any sums which may be expended by the Board under the powers conferred on them by paragraph (*b*) of sub-s. 3 of this section. The contribution shall be assessed as an amount per gallon on all the regulated product sold by registered producers, and, subject to the provisions of paragraph (*a*) of sub-s. 2 of s. 25 and the corresponding provisions of ss. 26 and 27 hereof, every registered producer shall be required to contribute the same amount per gallon."

Para. (*b*) of sub-s. 3 of s. 24 authorizes expenditure by the Board for the encouragement of agricultural co-operation, research and education. Para. (*a*) of sub-s. 2 of s. 25, which applies to producer-retailers, and the corresponding provisions of ss. 26 and 27, which apply to producer-wholesalers and producers of certified milk respectively, provide that such producers shall pay into the fund a contribution per gallon equal in amount to nine-tenths of that provided in sub-s. 2 of s. 24, and that such contribution, unless otherwise determined by the Board, shall be payable monthly and shall be a debt due by them to the Board, which shall be recoverable by the Board accordingly.

The only question now at issue between the parties is raised by answer 4 of the condescendence in the following passage: "The defender believes and avers that in computing the amount of the said contributions the pursuers have illegally included items which are not part of the costs of operating the Scheme within the meaning of the said s. 24, sub-s. 2. In particular, the defender believes and avers that the pursuers, in making the said computation, have in each month purported to include as a cost of operating the Scheme large sums representing the difference between the actual price received by them for milk disposed of by them in the manufacturing market and the price which, as the pursuers pretend, would have been received by them if the said milk had been disposed of in the liquid market. In each of the said months the selling price in the liquid market (which was fixed by the pursuers) exceeded the price in the manufacturing market. The sums representing the said difference are not costs of operating the Scheme within the meaning of s. 24, sub-s. 2, and the pursuers, in including the said sums in assessing the said contributions, have acted illegally and ultra vires. The defender is not bound to pay a share of the said contribution as so computed."

In answer to this averment the pursuers state: "Explained that the selling price each month in the liquid market was only secured by the pursuers diverting a proportion of the milk produced in the area of the Scheme to the secondary market, where a lower price was obtainable, and the cost to the pursuers of this diversion was necessarily a cost of operating the said Scheme."

My Lords, it is necessary to examine the meaning and effect of the portion of the contributions thus challenged by the appellant. In my opinion this is made clear by the admissions of the respondents quoted above.

It is provided by s. 24, sub-s. 2, that, subject to the adjustment as to nine-tenths, in the case of the second class of producers, every registered producer shall be required to contribute the same amount per gallon. Accordingly, subject to the adjustment as to nine-tenths, the ordinary producers are equally liable with the second class for the contribution in question ; but (as will appear from sub-s. 3 (*e*) cited below) the produce of the contribution from both classes will go to benefit only the ordinary producers, who will thus not only get the return of their own contributions, but will also have divided among them the contributions from the second class, who will get nothing back. In short, the contributions levied from the second class will form compensation to the ordinary producers for the greater diversion of their milk into the manufacturing market in order to keep up the level of prices in the liquid market. In other words, by this means the Board are pro tanto extending the averaging of the proceeds of sales in the two markets so as to affect the second class of producers.

My Lords, I have come to the conclusion that the contribution challenged by the appellant is not authorized by the Scheme, and is beyond the powers of the Board. In the first place, to collect a contribution, subject to the adjustment as to nine-tenths, at the same amount per gallon, and thereafter to return to a limited number of the contributories the amount of their contributions, does not, in my opinion, comply with the express provisions of s. 24, sub-s. 2, of the Scheme. In the second place, I am of opinion the Board are not entitled to extend the averaging of sale prices in the two markets so as to affect the second class of producers. Their only power of averaging sale prices in the two markets is conferred by s. 24, sub-s. 3 (*e*), which provides as follows :—

" (*e*) As soon as practicable after the end of each calendar month, the Board shall distribute any money standing to the credit of the fund, which is in the opinion of the Board not required for the operation of the Scheme, amongst registered producers, the proceeds of the sale of whose milk are required to be paid into the fund, in proportion to the quantity of milk sold by them to, or through the agency of the Board, so that, with the exception of the payments referred to in the last two preceding paragraphs, every such registered producer, notwithstanding the price at which his milk may have been disposed of, shall be paid at a uniform rate on the basis of an average price. Provided that the Board shall add to or deduct from the average price the amount, if any, by which the cost incurred in the haulage of the milk from the farm or premises where it is produced to the point of delivery as instructed by the Board exceeds or is less than the Standard Haulage Rate, as defined in section 51 hereof. Provided, however, that any registered producer whose milk is of a lower standard of quality than that specified by the Board from time to time for milk, other than officially graded milk, may be required by the Board, in respect of such milk, to accept such price, lower than the Average Price as the Board may determine."

Not only are the terms of that provision inapplicable to the second class of producers, but the latter are expressly exempted from the operation of that paragraph, and of the two preceding paragraphs by s. 25, sub-s. 1; s. 26, sub-s. 1; and s. 27, sub-s. 1. In my opinion, the contribution under challenge pro tanto extends the averaging of prices so as to affect the sale prices received by the second class, and constitutes a breach of that exemption, and is an unauthorized operation of the Scheme. This renders it unnecessary to consider the arguments as to the meaning of the word " costs," for, however wide or artificial, in relation to its context, that meaning may be, it cannot include the cost of an operation of the Scheme which is not permitted by the statutory Scheme.

The grounds on which I have formed my conclusions do not appear to have been considered by the Courts below in the present case, or in the previous special case in 1934, to which the present appellant was not a party. The discussion in the judgments appears to have been confined to the meaning of the word " cost."

I am therefore of opinion that the respondents have included among the elements which constitute the cumulo amount of the contributions sued for an element which they are not entitled to require from the appellant and which, in the present record, is not separable from the legitimate elements. In these circumstances I am of opinion that the respondents' averments are irrelevant and insufficient to support the conclusions of the summons as laid, and that the appellant is entitled to be assoilzied from the conclusions of the summons as laid. This will not prevent the respondents, if they find it necessary, from bringing a fresh action for recovery of the legitimate elements in the contributions sought to be recovered: *Gillespie* v. *Russell* (1); *Waterson* v. *Murray & Co.* (2)

Accordingly I am of opinion that the appeal should be allowed, that the interlocutor of the Sheriff-Substitute dated February 7, 1935, and the interlocutor of the First Division of the Court of Session dated May 30, 1935, should be recalled, and that the defender should be assoilzied from the conclusions of the summons as laid. The appellant should get the costs of this appeal and his expenses in the Courts below.

LORD MACMILLAN (read by LORD MAUGHAM). My Lords, the only provision of the Scottish Milk Marketing Scheme on which the respondents can rely as empowering them to make any levy on the appellant is to be found in s. 24, sub-s. 2. They are thereby authorized to recover from the appellant such contribution as they may from time to time consider necessary "to cover the cost of operating the Scheme," such contribution to be assessed in the prescribed manner. It is maintained by the respondents that these words entitle them to exact from the appellant a contribution towards making up the difference between the price obtained by the respondents for milk sold by them in the manufacturing market and the price which would have been obtained for it in the liquid market, or in other words to exact what may be described as a compensatory levy from the appellant.

If this was the intention of the framers of the Scheme I

(1) (1859) 3 Macq. 757.

(2) (1884) 11 R. 1036.

cannot conceive of a less straightforward way of expressing it. No doubt it is possible to disengage from the complexities which under the Scheme beset those who deal in what used to be called milk but which we must now call " the regulated product," a general conception of equalizing the price ultimately to be obtained by all who have milk to sell; but imposts upon the subject cannot be imposed by inference. It is a sound and well recognized principle that " a taxing statute must impose a charge in clear terms or fail, since it is to be construed contra proferentem ": *Levene* v. *Inland Revenue Commissioners* (1), per Viscount Sumner. The levy which the respondents seek to impose upon the appellant is none the less a tax because it is part of a Scheme intended for his economic benefit.

The critical words in the present case—" the costs of operating the Scheme "—are in my opinion quite inapt to cover the compensatory levy which the appellant challenges. That the respondents obtain a lower price for milk sold for manufacturing purposes than is obtained for milk sold in the liquid market is doubtless the case. But this is an incident of the Scheme, not a " cost " of operating it. They have not incurred any " cost " by selling milk in the manufacturing market. There has been no disbursement on their part. At most it can only be said that they have received a less return for the milk of which they have so disposed than they would have received if they had disposed of it in the liquid market. But I cannot find any justification, least of all in what is in effect a taxing statute, for construing the words " the costs of operating the Scheme " as including this difference of price.

My noble and learned friend Lord Thankerton has disclosed other and formidable difficulties in the way of the respondents, but for myself I am content to say that the words of s. 24, sub-s. 2, do not, in my opinion, warrant their contention. I accordingly concur in the motion that the appeal should be allowed.

LORD MAUGHAM. My Lords, I have had an opportunity

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(1) [1928] A. C. 217, 228.

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of considering the opinion which my noble and learned friend Lord Thankerton has delivered. I entirely agree with it and will only add that I also agree with the view which my noble and learned friend has expressed as to the meaning of the words "the cost of operating the Scheme." I therefore concur in the motion that the appeal should be allowed.

Ordered that the interlocutor complained of be reversed and that the cause be remitted back to the Court of Session in Scotland with a direction that the defender should be assoilzied from the crave of the initial writ as laid, and to do therein as shall be just and consistent with this judgment: Further ordered that the respondents pay to the appellant the costs of the action in the Sheriff Court and in the Court of Session and also the costs incurred by him in respect of the appeal to this House.

Solicitors for appellant: *Ince, Roscoe, Wilson & Glover, for J. Sinclair Lawrie, Edinburgh.*

Solicitors for respondents: *Ellis & Fairbairn, for Ketchen & Stevens*, W.S., Edinburgh.

[HOUSE OF LORDS.]

R. & W. PAUL, LIMITED . . . . . APPELLANTS; H. L. (E.)*

AND 1936

THE WHEAT COMMISSION . . . . RESPONDENTS. *July* 22.

Wheat Commission—Quota payment—Money paid under protest—Claim to recover—Flour—Wheat offals—By-law—Validity—Ultra vires—Arbitration Act, 1889 (52 *&* 53 *Vict. c.* 49)—*Public Authorities Protection Act,* 1893 (56 *&* 57 *Vict. c.* 61)—*Wheat Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 24), *s.* 3, *sub-s.* 1; *s.* 5, *sub-ss.* 1, 2; *s.* 20, *sub-s.* 1.

By s. 20, sub-s. 1, of the Wheat Act, 1932: "'Flour' means the products produced by the milling of wheat, and includes all such products except substances separated in the milling as wheat offals, and . . . . where such products . . . . are mixed with other substances, whether or not produced by the milling of wheat and whether milled with the wheat or subsequently added, the mixture shall be deemed to be flour." . . . . "'Wheat offals' means the residual products which, in the process of milling wheat, are extracted therefrom as germ or for animal or poultry food."

By s. 5, sub-s. 1, the Wheat Commission are empowered to make by-laws for giving effect to the provisions of the Act. By sub-s. 2: "Without prejudice to the generality of the power conferred by" sub-s. 1, "by-laws made under this section shall in particular provide . . . . (*m*) for the final determination by arbitration of disputes arising as to such matters as may be specified in the by-laws."

Purporting to act under this section the Wheat Commission made a by-law, numbered 20, providing that "Any dispute arising between the Wheat Commission and any other person as to whether any substance is flour . . . . shall be referred to arbitration," as therein provided, "and the decision of the referee as to the matter in dispute shall be final and conclusive. The following provisions shall have effect in relation to any reference under this by-law:— The Arbitration Act, 1889, shall not apply." . . . .

The appellants, who were provender merchants and importers of feeding stuffs for animals and poultry, imported certain consignments of a substance known as "German middlings" and containing a relatively high percentage of flour.

The Wheat Commission claimed that the middlings were flour within the meaning of the Wheat Act, 1932, and that the appellants were liable to make quota payments under s. 3, sub-s. 1, of the Act in respect of them. The appellants claimed that all the consignments were consignments of wheat offals and not of flour; but in order to obtain a release of the goods from the Officers of Customs and Inland Revenue, they had to produce a receipt for 2554*l.* 2*s.* 3*d.*, which they paid under protest and brought the action to recover. In the case of three of the consignments the payments were made more than six months before the issue of the writ, and as to these consignments the Wheat Commission pleaded the Public Authorities Protection Act, 1893.

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* *Present:* VISCOUNT HAILSHAM L.C., LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

Held, (1.) that the middlings were not flour within the meaning of the Wheat Act, 1932;

(2.) that by-law 20 purporting to exclude the operation of the Arbitration Act, 1889, from any arbitration under s. 5, sub-s. 1, of the Wheat Act, 1932, was ultra vires and invalid;

(3.) that the Wheat Commission was a public authority within the meaning of the Public Authorities Protection Act, 1893, and was protected by that Act against any suit for the recovery of the sums exacted which was not brought within six months after the date of the exaction.

Appeal from an order of the Court of Appeal.

The Wheat Act, 1932, is " An Act to secure to growers of home-grown millable wheat," that is wheat conforming to a standard prescribed by regulations, " a standard price and a market therefor; to make provision for imposing on millers and importers of flour obligations to make payments calculated by reference to a quota of such wheat and as to the disposal of the moneys thereby received; to provide for such millers being required to purchase unsold stocks of wheat; and for purposes connected with the matters aforesaid." The Act was passed for the purpose of affording financial assistance to growers of wheat in the United Kingdom. By s. 2, sub-s. 3, it provided means for ascertaining the average price obtained by registered growers throughout the United Kingdom of home-grown millable wheat of their own growing sold by them in the cereal year, i.e. the year ending on July 31. The price so arrived at is called " the ascertained average price"; by sub-s. 3 the price of 10*s.* per hundredweight is called the " standard price."

The First Schedule to the Act contains the constitution of the Wheat Commission, the respondents to this appeal, as a body corporate with a common seal consisting of a chairman, vice-chairman and seventeen other persons representing the interests of (*a*) growers of home-grown wheat; (*b*) millers of flour; (*c*) importers of flour; (*d*) dealers in home-grown millable wheat; (*e*) consumers of flour.

Sect. 1, sub-s. 1, provides that if, in any cereal year, the ascertained average price of home-grown millable wheat is less than the standard price, every registered grower shall, subject to regulations and by-laws made under the Act, be entitled to receive from the Wheat Commission in respect of every hundredweight of such wheat of his own growing sold by him in that year (with a certain immaterial exception) a payment called a "deficiency payment" representing the difference between the ascertained average price and the standard price.

By s. 3, sub-s. 1, for the purpose of meeting the expenditure to be defrayed by the Wheat Commission under the Act, every miller and every importer of flour "shall be liable to make to the Wheat Commission, in respect of each hundredweight of his output of flour, a payment (hereinafter referred to as a 'quota payment') of an amount calculated and prescribed in accordance with the provisions of this section so as to represent, as nearly as may be, a sum equal to what would have been the price deficit in respect of the quota of home-grown millable wheat used in the production of that hundredweight, if the anticipated supply of such wheat for the cereal year in which that hundredweight was delivered had been used at a uniform rate per hundredweight of flour in the production of the estimated supply of flour for that year": there follows a proviso exempting millers from the provisions of the section in respect of every hundredweight consisting of meal delivered by them for consumption, without further manufacture, as animal or poultry food.

By s. 5, sub-s. 1, of the Act the Wheat Commission are empowered to make by-laws for giving effect to the provisions of the Act, but no such by-laws are to come into force until they have been approved by the Minister of Agriculture and Fisheries. By sub-s. 2: "Without prejudice to the generality of the power conferred by the last foregoing sub-section, by-laws made under this section shall in particular provide— . . . . (*m*) for the final determination by arbitration of disputes arising as to such matters as may be specified in the by-laws."

By s. 20, sub-s. 1, "'Flour' means the products produced by the milling of wheat, and includes all such products except substances separated in the milling as wheat offals, and . . . . where such products . . . . are mixed with other substances, whether or not produced by the milling of wheat and whether milled with the wheat or subsequently added, the mixture shall be deemed to be flour."

"'Wheat offals' means the residual products which, in the process of milling wheat, are extracted therefrom as germ or for animal or poultry food."

A grain of wheat consists of the husk, the endosperm, or kernel or flour bag, and the germ. The object of milling is to reduce the endosperm into flour. A complete separation of the endosperm from the rest of the grain is not possible because some endosperm adheres to the separated particles of husk, and some husk in the form of powder becomes mixed with the reduced endosperm. The modern rolling mill by pressure reduces the endosperm to powder and the husk to flakes and so facilitates the separation of the husk from the endosperm.

The process of milling consists of three operations: (i.) the breaking down of the grain by passing it through grooved rollers, the "break-rolls," and so producing semolina; (ii.) the purification of the semolina; (iii.) the reduction of the purified semolina to the fineness of flour. This is effected by submitting the semolina to a series of sifting operations. Those particles which pass through the first sieve are carried to a second, and so on, and in this way various streams of semolina are extracted, and these are led to the purifying machinery.

Those particles which fail to pass through the first sieve are led to the second break-rolls and then submitted to a sieving process like that described above; and in like manner those which pass through the sieve are led to the purifying machinery and those which fail to do so are led to the third break-rolls.

The substance which is presented to the fourth break-roll is substantially bran. Of the endosperm adhering to the bran as much as may be is separated and led to the purifying machinery, the purpose of which is to remove as far as possible such particles of husk as may have found their way into the various streams of semolina. The method employed is to force through the product which is being sifted a current of air which carries away the particles of husk from the heavier particles of semolina.

The semolina after purification is passed through a series of "reduction rolls," and through a series of sieves called "dressers." Ultimately the particles of husk are so reduced in size as to be practically inseparable from the semolina or endosperm.

Of the total weight of an average grain of wheat 15 per cent. consists of husk, 2 per cent. of germ, and 83 per cent. of endosperm. In practice from 70 to 72 per cent. of the weight of the grain is normally extracted in the form of flour. The mechanism of a mill is such that a miller can, if he chooses, extract less than this percentage.

By-law 20 of the Wheat By-laws, 1932 (Statutory Rules and Orders, 1932, No. 588) (1), purporting to be made under s. 5, sub-s. 2 (*m*), above mentioned, provided as follows: "Any dispute arising between the Wheat Commission and any other person as to whether any substance is flour . . . . shall be referred to the arbitration of such member of the panel of referees appointed for the purpose by the Minister of Agriculture and Fisheries as may be agreed upon by the parties to the dispute or, in default of agreement, by the Minister, and the decision of the referee as to the matter in dispute shall be final and conclusive.

"The following provisions shall have effect in relation to any reference under this by-law :—

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(1) This by-law was revoked by the Wheat Commission (Approval of By-laws) No. 8 Order (S. R. & O. 1935, No. 285).

"The Arbitration Act, 1889, shall not apply."

Messrs. R. & W. Paul, Ld., the plaintiffs in the action, were provender millers, merchants and importers of feeding stuffs for animals and poultry. In the years 1933 and 1934 they imported from Germany consignments of a substance known in the trade as "middlings." There were in all fifteen consignments. On the arrival of the goods the Wheat Commission, the defendants in the action, claimed that the goods were "flour" within the meaning of s. 20, sub-s. 1, of the Wheat Act, 1932. With the exception of consignments ex *Maartje* and ex *Deneb* respectively the defendants demanded quota payments from the plaintiffs in respect of the goods to the amount of 2554*l*. 2*s*. 3*d*., and the Commissioners of Customs and Excise acting under s. 6, sub-s. 1, of the Wheat Act, 1932, refused to sign entries of the consignments for home use except upon a receipt for that sum. The plaintiffs insisted that the goods were "wheat offals" within the meaning of the Act, and that they were not liable to make any quota payment in respect of them; but in order to obtain release of the goods they paid under protest the amount demanded, and obtained the necessary receipt. Having received the goods they claimed to recover the amount paid under protest as having been exacted by the defendants colore officii and without lawful authority. The writ was issued on March 5, 1934. The first question in the case was whether the middlings were "flour" or "wheat offals."

The defendants, besides contending that the middlings were flour, pleaded that the Court had no jurisdiction to determine the issue whether the consignments in question were or were not "flour" within the meaning of the Wheat Act, 1932, as that issue was expressly referred to arbitration by by-law 20. As regards the first three consignments, ex *Resnova*, *Noordstad* and *Mascotte* respectively, comprising 583 tons 10 cwt. or thereabouts, to obtain which the plaintiffs had made payments on April 18, April 29 and May 12, 1933, more than six months before the issue of the writ, the defendants pleaded that the plaintiffs' claim was barred by the Public Authorities Protection Act, 1893.

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The action was tried in the King's Bench Division before Roche J., who held (1.) that the consignments consisted of "wheat offals" and not of "flour" within the meaning of the Wheat Act, 1932, and were therefore not subject to quota payments. He further held that by-law 20 was ultra vires. He held, however, that the defendants were a public authority and entitled to the benefit of the Public Authorities Protection Act, 1893, and that the plaintiffs could not recover the payments made in respect of the consignments ex *Resnova, Noordstad* and *Mascotte.* In the result judgment was entered for the plaintiffs for 1912*l.* 5*s.* 2*d.*

The defendants appealed to the Court of Appeal. There was a cross-appeal by the plaintiffs from so much of the judgment as declared that they were not entitled to a return of the money paid by them in order to release the consignments ex *Resnova, Noordstad* and *Mascotte.* The Court of Appeal (Lord Hanworth M.R. and Slesser and Romer L.JJ.) held, for reasons other than those relied on by Roche J., that by-law 20 was ultra vires; they affirmed the decision of the learned judge that the defendants were a public authority and entitled to claim such protection as is afforded by the Public Authorities Protection Act, 1893. But they differed from the learned judge on the question whether the consignments in question consisted of flour or of wheat offals. They held that, inasmuch as "wheat offals" by the definition in s. 20, sub-s. 1, of the Act means the residual products extracted in the process of milling wheat, and as the object of millers must be to extract the greatest possible amount of flour, if less than the greatest possible amount of flour has been extracted the residue must consist of flour and cannot be "wheat offals" within the statutory definition. There was evidence that an efficient mill could produce 70 per cent. of flour from a given quantity of wheat, leaving 30 per cent. in the residue. The consignments in question consisted of a mixture containing considerably more than 30 per cent. of flour. Two consignments were taken as representative, one ex *Zeester* and the other ex *Batavier VII.* The *Zeester* consignment contained 40 per cent. of semolina, i.e. partially milled flour, showing that much less than the maximum amount of flour had been extracted from the wheat. The *Batavier VII.* consignment contained about 38 per cent. of flour. On these facts the Court of Appeal held that the consignments consisted of " flour " within the meaning of s. 20, sub-s. 1, of the Act and that the plaintiffs were not entitled to recover the sum they claimed. They accordingly allowed the appeal, and dismissed the cross-appeal.

The plaintiffs appealed to this House.

1936. June 16. *Gavin Simonds K.C.* and *John Whyatt* for the appellants. With all respect to the Court of Appeal the learned judges have been led into the error of treating a purely commercial question as if it were one of analytical chemistry, a mill as a laboratory, and a miller as a research worker. A " miller," as defined by s. 20, sub-s. 1, " includes every person who, by way of Trade, mills wheat . . . . for the purpose of producing flour." He produces flour for a profit. If he finds it more profitable to do so he will stop short of producing the maximum quantity of flour to be extracted from the wheat, and will supply other customers with wheat offals containing more than 30 per cent. of flour. The learned judge at the trial found that the consignments in question consisted of a substance produced in the milling of wheat, with the object of obtaining flour as the primary product, and separated in the process as wheat offals; they were in fact intended for poultry food. Consequently they were not " flour " within the meaning of the Wheat Act, 1932, and the respondents had no right to exact the payment which the appellants sought and still seek to recover.

[*Lord Provost and Magistrates of Glasgow* v. *Farie* (1) was cited.]

Secondly, the Public Authorities Protection Act, 1893, has no application to the act complained of. That Act protects " acts done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority." . . . . Assuming that the refusal to release the goods except upon the production by the appellants of a receipt for the quota payments was an act done in intended execution of the Wheat Act, 1932, the wrongful retention of the money paid in order to obtain a release of the goods was not an act protected by the statute.

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(1) (1888) 13 App. Cas. 657.

With regard to by-law 20 the Court of Appeal were right in holding that it was ultra vires. It purports to be made under s. 5, sub-s. 2, of the Wheat Act, which enables by-laws to be made for giving effect to the provisions of the Act, but contains no express words authorizing by-laws which purport to oust the jurisdiction of the Court under the Arbitration Act, 1889.

June 18. *Sir William Jowitt K.C.* and *Hubert Hull* for the respondents. Sect. 20, sub-s. 1, of the Act gives the definition of "Miller"; the word "includes every person who, by way of trade, mills wheat in the United Kingdom for the purpose of producing flour." And "'Flour' means the products produced by the milling of wheat, and includes all such products except substances separated in the milling as wheat offals." . . . . There follow words to the effect that certain mixtures are to be deemed to be flour, but these words do not alter or modify the definition of flour. The definition implies that a "miller" is one who mills wheat for the purpose of producing flour, and not a mixture of flour and offals, and the Court of Appeal were right in so holding.

Then come the words which complete the definition of "flour": "Where such products as aforesaid"—i.e., "flour"—"are mixed with other substances, whether or not produced by the milling of wheat and whether milled with the wheat or subsequently added, the mixture shall be deemed to be flour." It follows that the consignments were "flour" within the meaning of the Act.

Secondly, by-law 20 is authorized by the express words of the Act, which provides by s. 5, sub-s. 1, that by-laws may be made for giving effect to the provisions of the Act, and by s. 5, sub-s. 2, that the by-laws so made shall particularly provide for the final determination by arbitration of disputes arising as to such matters as may be specified in the by-laws. One of the matters specified in by-law 20 is a "dispute arising between the Wheat Commission and any other person as to whether any substance is flour." A by-law therefore dealing with that question has statutory force and effect: *Caledonian Ry. Co.* v. *Greenock and Weems Bay Ry. Co.* (1); *Institute of Patent Agents* v. *Lockwood* (2); *Joseph Crossfield & Sons* v. *Manchester Ship Canal Co.* (3); *Norwich Corporation* v. *Norwich Electric Tramways Co.* (4); *Great Western Ry. Co.* v. *Phillips & Co.* (5); *London and North Western Ry. Co.* v. *Jones* (6); *West Suffolk County Council* v. *Olorenshaw* (7); *In re Jones and Carter's Arbitration* (8); *Baron Reitzes de Marienwert* v. *Administrator of Austrian Property* (9); *Lowther* v. *Clifford* (10); *Minister of Health* v. *The King, on the prosecution of Yaffé* (11); and *Ellen Street Estates* v. *Minister of Health.* (12)

There remains the question whether the by-law is invalid in that it excludes the operation of the Arbitration Act, 1889. Sect. 5, sub-s. 2, of the Wheat Act, 1932, expressly authorizes by-laws to be made "for the final determination by arbitration" of disputes. An arbitration under the Arbitration Act, 1889, is necessarily not a final determination by arbitration, for by s. 7 of that Act the arbitrators have power to state an award in the form of a special case for the opinion of the Court. From the opinion of the Court there may be an appeal to the Court of Appeal, and from that Court to this House: *British Westinghouse Electric Manufacturing Co.* v. *Underground Electric Railways Company of London.* (13) Accordingly by providing for a "final determination by arbitration" the Wheat Act, 1932, by s. 5, sub-s. 2, impliedly authorizes the exclusion by by-law of the Arbitration Act, 1889, from the settlement of disputes.

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(1) (1874) L. R. 2 Sc. 347.
(2) [1894] A. C. 347.
(3) [1905] A. C. 421.
(4) [1906] 2 K. B. 119.
(5) [1908] A. C. 101.
(6) [1915] 2 K. B. 35.
(7) [1918] 2 K. B. 687.
(8) [1922] 2 Ch. 599.
(9) [1924] 2 Ch. 282.
(10) [1927] 1 K. B. 130.
(11) [1931] A. C. 494.
(12) [1934] 1 K. B. 590.
(13) [1912] A. C. 673.

Counsel for the appellants were not called upon in reply.

June 19. The House took time for consideration.

July 22. LORD ATKIN. My Lords, I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Macmillan. I entirely agree with it, and have nothing to add.

LORD RUSSELL OF KILLOWEN. My Lords, I, too, have had an opportunity of reading and considering the opinion about to be delivered by my noble and learned friend. It so accurately expresses my own views that I find it quite unnecessary to add anything thereto.

LORD MACMILLAN. My Lords, I am authorized by the Lord Chancellor and my noble and learned friend Lord Wright to state that they concur in the opinion which I am about to read.

My Lords, the controversy in this action relates to fifteen consignments of goods imported by the appellants into this country from Germany in 1933–34. On the merits the sole question for determination is whether these consignments consisted of "flour" or of "wheat offals" within the meaning of the Wheat Act, 1932. But there is a preliminary point to be decided as to jurisdiction and also a point as to the applicability of the time limit prescribed by the Public Authorities Protection Act, 1893.

The respondents, the Wheat Commission, who are the defendants in the suit, were incorporated by the Wheat Act, 1932, for the purpose of carrying the Act into effect. The object of that measure, as the long title sets out, is (inter alia) "to secure to growers of home-grown millable wheat a standard price and a market therefor" and "to make provision for imposing on millers and importers of flour obligations to make payments calculated by reference to a quota of such wheat, and as to the disposal of the moneys thereby received." It is unnecessary to describe the elaborate machinery provided by the Act for effecting its object. For the present purpose it is enough to state that in order to meet the expenditure to be defrayed by the Wheat Commission under the Act every importer of flour is rendered liable to make to the Wheat Commission a payment (described as a "quota payment" and to be calculated in the prescribed manner) in respect of every hundredweight of imported flour entered by him or on his behalf, in accordance with the enactments relating to customs, for home consumption or home use: s. 3, sub-s. 1, which I have expanded by incorporating the definitions contained in s. 20, sub-s. 1. The statute thus imposes what is in effect a customs duty on flour imported into this country for home consumption or home use.

What then is "flour" within the meaning of the Act? Sect. 20, sub-s. 1, provides the following definitions, which are of critical importance in the interpretation and application of the Act:—

"'Flour' means the products produced by the milling of wheat, and includes all such products except substances separated in the milling as wheat offals . . . ."

"'Wheat offals' means the residual products which, in the process of milling wheat, are extracted therefrom as germ or for animal or poultry food."

Before proceeding to consider whether the fifteen consignments in question were or were not consignments of flour as so defined I must first give a brief history of them. It appears that in 1933 and 1934 the appellants, who are merchants and importers on a large scale of animal and poultry feeding stuffs, placed orders with various millers in Germany for goods described as "wheat middlings" or "German wheat middlings." It was common ground that in the trade and in the art of milling the term "middlings" designates certain grades of wheat offals—I am not professing to employ the expression here in its statutory sense—used for consumption by animals or poultry. On the arrival of the consignments in this country the Wheat Commission claimed in each case that they consisted of flour and demanded the appropriate quota payment from the appellants. The appellants maintained that the goods were wheat offals and not flour and contested the right of the Commission to exact any payment in respect of them. In order, however, to obtain entry of the goods the appellants, under protest, paid to the Commission in the case of thirteen out of the fifteen consignments quota payments amounting in all to 2554*l.* 2*s.* 3*d.* As regards the two remaining consignments, ex *Maartje* and ex *Deneb*, in the case of the former the Collector of Customs by an oversight signed the entry without any quota payment being made, and in the case of the latter for some reason no quota payment has yet been made.

From among the thirteen consignments, on which payment was made under protest, it is necessary to discriminate the three consignments ex *Resnova*, ex *Noordstad* and ex *Mascotte*. The quota payments on these three consignments amounting to 641*l.* 17*s.* 1*d.* were demanded and paid under protest in April and May, 1933, being more than six months before the issue on March 5, 1934, of the writ of summons in the present suit. Hence the point as to the application of the Public Authorities Protection Act, 1893. Moreover, with regard to these three consignments arbitration proceedings, purporting to be under the Wheat Act and the relative by-law 20, were initiated between the appellants and the respondents to determine whether they were consignments of flour or consignments of wheat offals. By three awards dated July 3, 1933, the referee to whom the matter was submitted found that all three consignments were flour for the purposes of the Act.

In their points of claim in the present proceedings the appellants claim repayment of the sum of 2554*l.* 2*s.* 3*d.* as having been exacted from them in respect of thirteen of the consignments colore officii and without lawful authority, a declaration that by-law 20 of the Wheat By-laws, 1932, is illegal and ultra vires, a declaration that the three awards above mentioned are null and void, and a declaration that none of the fifteen consignments in question was or is liable to quota payments.

As regards the three awards dated July 3, 1933, Roche J. (as he then was), before whom the case came in the first instance, found that the referee had acted in the arbitrations in a manner so "wrongheaded . . . . as to be contrary to natural justice" and the learned judge had no doubt that a Court of equity would entirely refuse to allow such awards to receive effect. In the Court of Appeal counsel for the respondents did not attempt to defend the validity of the awards and they may consequently be treated as null and void. But this does not absolve your Lordships from the task of determining whether by-law 20 was intra vires of the Wheat Commission under the Act, for it was maintained at your Lordships' bar that the by-law was valid and that, as the by-law requires any dispute as to whether any substance is flour to be submitted to arbitration, no Court of law has jurisdiction to determine whether the consignments in question were flour or not.

The point of jurisdiction arises in this way. By s. 5, sub-s. 1, of the Act of 1932 the Wheat Commission is empowered "to make by-laws for giving effect to the provisions of this Act," and by s. 5, sub-s. 2, it is provided that without prejudice to the generality of this power, "by-laws under this section shall in particular provide . . . . (*m*) for the final determination by arbitration of disputes arising as to such matters as may be specified in the by-laws."

Purporting to exercise the power thus conferred on them the Wheat Commission made a series of by-laws of which No. 20, so far as material, reads as follows (I quote from the Third Edition of the By-laws, revised to November 30, 1933) :—

"20. Any dispute arising between the Wheat Commission and any other person as to whether any substance is flour . . . . shall be referred to the arbitration of such member of the panel of referees appointed for the purpose by the Minister of Agriculture and Fisheries as may be agreed upon by the parties to the dispute or, in default of agreement, nominated by that Minister, and the decision of the referee as to the matter in dispute shall be final and conclusive."

The by-law proceeds to provide that, in relation to any reference under it (inter alia), "(*a*) The Arbitration Act, 1889, shall not apply."

I should mention that under s. 5, sub-s. 1, all by-laws require to be approved by an order of the Minister of Agriculture and Fisheries and the Secretaries of State concerned with agriculture in Scotland and Northern Ireland respectively, acting jointly, and that under s. 18, sub-s. 1, all by-laws require to be laid before Parliament, and if either House within the prescribed time resolves that any by-law be annulled it shall forthwith be void. It is understood that this procedure was duly observed and that no objection was taken to by-law No. 20.

Both Roche J. and all the learned judges in the Court of Appeal unanimously found the by-law in question to be ultra vires of the Wheat Commission. They agree in affirming the general principle that the subject cannot be deprived of his right to resort to the Courts of law of his country except by express enactment, and they find in the statute no words expressly ousting the jurisdiction of the Courts or expressly authorizing the Wheat Commission to frame by-laws which shall have this effect. But Roche J. and the Court of Appeal deal with the matter somewhat differently. To Roche J. the cardinal vice of the by-law is to be found in its exclusion of the application of the Arbitration Act, 1889, with the consequent deprivation of the rights which that Act confers and in particular the right of obtaining the judgment of the Court on any point of law arising. The criticism of the Court of Appeal is more fundamental, for in their view a power to make by-laws "for giving effect to the provisions" of the Act does not extend to the making of a by-law referring to arbitration the question "whether any substance is flour." The argument is that as the Act applies only to substances which are flour, it is a condition precedent of the application of the Act to any substance that it shall be flour. Consequently a by-law referring to arbitration the question whether a particular substance is flour is a by-law dealing with the question whether the provisions of the Act apply to the substance and not a by-law for giving effect to the provisions of the Act. A by-law for giving effect to the provisions of the Act, it is said, assumes the application of the Act; the question whether the Act applies is a prior question of law and a by-law professing to deal with this matter is not within the ambit of the delegated power of legislation conferred. The Wheat Commission were thus not empowered to specify in the by-law, as a matter any dispute as to which was to be finally determined by arbitration, such a matter as the application of the Act to a particular substance.

My Lords, I do not agree with the learned judges of the Court of Appeal that the scope of the questions which by by-law under the Act may competently be referred to arbitration does not include the question whether a particular consignment is or is not a consignment of flour. I reach my conclusion that by-law 20 is ultra vires by much the same steps as Roche J. I find first that there are no express words in the Act ousting the jurisdiction of the Court, but only a power to make by-laws for the final determination by arbitration of disputes arising as to such matters as may be specified in the by-laws. I next find that the by-law in question not only specifies as a matter to be determined by arbitration " any dispute . . . . as to whether any substance is flour," but goes on to provide that to such arbitration the Arbitration Act, 1889, shall not apply. The Arbitration Act is a statute of general application and it confers a valuable and important right of resort to the Courts of law. To exclude its operation from an arbitration is to deprive the parties to the arbitration of the rights which the Act confers. When a public general statute provides for the reference of disputes to arbitration it is to be presumed that it intends them to be referred to arbitration in accordance with the general law as to arbitrations, with all the attendant rights which the general law confers. I do not think that when Parliament enacts by one statute that disputes under it are to be referred to arbitration it can be presumed to have empowered by implication the abrogation of another statute which it has enacted for the conduct of arbitrations. Rather the contrary. If this is intended, express words to that effect are in my opinion essential, and there are here no such express words. I am accordingly of opinion that the Wheat

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Commission exceeded their powers when they made a by-law that every dispute as to whether any substance is flour should be determined by an arbitration to which the Arbitration Act should not apply. I have only to add that the by-law must, in my opinion, be condemned as a whole and that it cannot be salved by the excision of the objectionable provision, which is not a severable but a vital part of the by-law.

My Lords, the conclusion which I have reached, that the by-law is not effectual to preclude consideration by your Lordships of the important question on the merits to which I now proceed to address myself, may be received with less regret in view of the singularly unfortunate failure of the referee to deal justly between the parties in the three instances in which the question was referred to arbitration under the by-law.

What then, I again ask myself, is statutory flour which is subject to the quota payment, and what are statutory wheat offals, which are not? In the words of the statute, stated compendiously, flour means and includes all the products produced by the milling of wheat except substances separated in the milling as wheat offals, i.e. as residual products which in the process of milling wheat are extracted therefrom as germ or for animal or poultry food. What strikes one at once about this definition is that it is not expressed in any quantitative, analytical or scientific terms. No such criterion of discrimination is prescribed. It is a description rather than a definition. It assumes that the milling of wheat is a known industrial process, but it does not define that process. It may, however, be taken to refer to the process of milling wheat for the purpose of producing flour, as in the definition which the Act gives of the term "miller" (although that definition is limited to millers in the United Kingdom). The process produces two things, a primary product, namely flour, and residual products, namely wheat offals. In the process the wheat offals are "separated" (presumably from the flour) as wheat offals and are "extracted" from the wheat as germ or for animal or poultry food. So much but no more the Act tells us.

If there was a precise and definitely ascertained process of milling wheat, the definition might attain some measure of

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certainty, for there might be in the industry an accepted standard of quantitative separation or extraction of residual products which it might be legitimate to imply in the definition. But the process of milling wheat for the production of flour is not a process characterized by any exactitude. Wheat, as the parties are agreed, consists of 83 per cent. of endosperm or kernel, 15 per cent. of husk and 2 per cent. of germ. The last may be neglected. If in the process of milling the endosperm could be entirely separated from the enveloping husk and ground down to powder, the product would be pure flour. But the process of milling is not in practice, and could not practically be, carried so far as to separate or extract all the husk and leave nothing but pure flour. So all commercial flour, even the finest, contains some husk. Similarly the residual products extracted from the wheat as offals in the process of milling are not pure husk but contain a varying proportion of flour. There is no fixed standard determining the amount of husk in flour or the amount of flour in offals. It is obvious that a miller who is engaged in milling wheat for the purpose of producing flour may separate or extract from the wheat more or less residue according to the efficiency of his machinery, the methods which he employs and the requirements of his market. He produces, as I have said, two marketable commodities, flour, his primary product, and wheat offals, his residual product. The quality and composition of those two products may vary within a wide range as between one mill and another and between one country and another, and may be affected by the qualitative demands of the market from time to time. The statute nowhere says that the process of milling must for the purposes of the Act conform to any particular standard of extraction. It does not say how much flour or how much offal the miller must obtain from milling a given quantity of wheat.

My Lords, at an early stage of the hearing your Lordships expressed the view, the soundness of which is in my opinion beyond question, that the scientific evidence adduced at the trial as to the composition of wheat, flour and offals, however interesting, was entirely beside the question. I find no warrant whatsoever in the statute for importing into it any such tests, which are not in use in the trade, and which have been devised, partly for the purposes of this case, by the ingenuity of chemists in their laboratories. This, be it remembered, is a statute laying an impost upon the subject. If the Legislature had been minded to make the liability to tax depend upon any such analytical tests, it would have prescribed them, as it has done in other instances. In common, therefore, with the rest of your Lordships I discard the scientific evidence as affording no assistance in the solution of the problem.

Now the Court of Appeal, while they were evidently more influenced by the scientific evidence than your Lordships have been, nevertheless did not adopt the chemical tests for flour which were put forward. In their search for some definite objective criterion the learned judges of the Court of Appeal were attracted by and have adopted a different test, on lines propounded by the Wheat Commission, for which, with all respect, I find just as little justification in the statute as I have found for the analytical tests. They find the clue in the expression "milling of wheat," and with the help of their interpretation of that expression they arrive at what I may call a process criterion. After premising that the primary product obtained from milling wheat within the meaning of the Act is indubitably flour, Romer L.J. proceeds: "Now presumably every person whose trade it is to mill wheat for the purpose of producing flour will mill it so as to obtain as much flour as possible. It seems to follow, therefore, that 'wheat offals' must be products that remain after wheat has been milled with the primary intention of extracting the greatest possible quantity of flour." "Milling wheat," he says in another passage, "means obtaining from the wheat as large a quantity of flour as possible." The learned Master of the Rolls (Lord Hanworth) also finds, as a result of his reading of the Act, that "it is postulated that the primary purpose of milling wheat is to produce as much flour as possible for home consumption or home use." There was evidence that an ordinarily efficient mill could produce from

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70 to 72 per cent. of flour from a given quantity of wheat. This is accepted by the Court of Appeal as the "normal" production of flour from wheat, and they hold accordingly that it is only after this percentage of extraction has been effected that the residual product can legally be held to be offals.

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My Lords, I find myself unable to adopt any such test and that for the simple reason that I find no warrant for it in the statute. It is certainly legitimate to interpret technical or trade terms in a statute in accordance with the usage of the art or trade, and if there had been evidence to the effect that at the time when the Wheat Act was passed no substances were commercially recognized as wheat offals unless they were the residual products left after 70 to 72 per cent. of flour had been extracted from the wheat, I should have felt the cogency of the view adopted by the Court of Appeal. Your Lordships will recall the criterion which this House adopted and has repeatedly applied for the determination of the meaning of the word "minerals" as used (without any statutory definition) in the Clauses Acts. The meaning of the word, it was held, must be that attributed to it in "the vernacular of the mining world, the commercial world and landowners"; in other words, in the vernacular of those who were practically concerned with minerals: *Lord Provost and Magistrates of Glasgow* v. *Farie* (1), per Halsbury L.C., adopting the words of James L.J. in *Hext* v. *Gill*. (2) But in the present case there was no evidence that in the vernacular of those concerned in manufacturing, dealing in or using wheat offals there was any consensus of opinion to the effect that only those substances are wheat offals which result from milling operations in which 70 to 72 per cent. of flour is extracted from the wheat milled. This so-called normal or average milling practice, as Roche J. points out, was "far from universal either before the Act or now." "As in the present, so in the past, it is clear from the literature," he says, "that offals such as the Commission would now describe as abnormal and subject to quota, have

(1) 13 App. Cas. 657, 669.

(2) (1872) L. R. 7 Ch. 699, 719.

been genuinely produced as residual products and sold and bought as offals for animal and poultry feeding." This the learned judge vouches by reference to articles on wheat offals contained in the official Journal of the Ministry of Agriculture which were produced in evidence. It is certainly remarkable to find that Public Department recommending that " attention should be directed to the excellent feeding value possessed by the fine middlings. From the feeder's point of view, it is to be regretted that so little of this class of offals is made in this country at the present time " ; while another public body in the shape of the Wheat Commission would apparently deny the name of offals to such middlings. The learned judge further finds that " not all British mills to-day produce the grade of offals which the defendant Commission desire to treat as normal and to adopt as the standard measure for the purposes of the Act, and some mills produce, or recently have produced, richer offals, that is to say, richer in endosperm content and feeding value and containing more flour, that is to say, finer offals. These home produced offals are, for uniformity of practice and consistency, in the Commission's view, subject to quota payment."

My Lords, I think I have said enough to show that the test which commended itself to the Court of Appeal is not one which can be justified. Romer L.J. suggests that support may be found for it in s. 20, sub-s. 2 (*b*), which provides that " if in any parcel containing substances produced by the milling of wheat the weight of those substances other than wheat offals does not exceed seven and a half per cent. of the weight of the parcel, the parcel shall be deemed not to contain flour." As all the products of the milling of wheat other than wheat offals are by definition flour I can only take this obscurely worded paragraph to mean that if a parcel of flour and wheat offals does not contain more than 7½ per cent. of flour the parcel is to be deemed not to contain flour. I confess I do not see how this helps. Moreover the Lord Justice records the astonishing fact that the 7½ per cent. has " always been treated by the Wheat Commissioners as being merely an approximate guide and in practice they do not claim as being flour any parcel that indicates an addition that is under 20 per cent." What right the Wheat Commission have to exercise "this tolerance," as it is described, I am at a loss to understand. If it shows anything, it shows how unworkable are the provisions of the Act as the Commission interpret them.

Lord Macmillan.

But, while the test on which the Court of Appeal relied must, in my opinion, be discarded, the fate of the fifteen consignments in question has still to be decided. I suggest that the words of the Act itself provide the means of doing so. The questions to be asked are: Were the substances of which the consignments were composed produced by the milling of wheat for the purpose of producing flour? Were they separated in the milling as wheat offals? Were they residual products extracted from wheat for animal or poultry food in the process of milling the wheat? To these questions the learned trial judge returns a compendious answer in the affirmative when he finds on the facts that "all these parcels were separated in the milling of wheat for flour as a primary product, that is to say, flour was the primary product desired to be produced and being produced in the milling, and that these parcels were separated in milling as wheat offals or residual products." The consignments were just as they came from the mills without any mixture, they were described as wheat middlings, which is a trade designation of a class of wheat offals, they were intended for animal or poultry food and it was for that purpose that the appellants purchased and imported them. The bona fides of all concerned is in no way challenged. The result, in my opinion, is that the appellants have established that all the consignments were within the meaning of the Act consignments of wheat offals and not of flour, and were consequently exempt from any quota payment.

The sequel would in the ordinary case be judgment for the return of the quota payments wrongfully exacted by the respondents in the case of thirteen of the consignments and a declaration that the two other consignments are not liable to any quota payment. But, as I indicated at the outset, the respondents plead that as regards three of the consignments they are entitled to keep the money which they have illegally obtained from the appellants because the appellants did not sue them within six months for the return of the money. The plea is based on the provisions of the Public Authorities Protection Act, 1893. The Courts below have unanimously held that the respondents are a public authority within the meaning of the Act, and I agree with them. The only other question is whether the act of the Wheat Commission in exacting the payments was an act done in the intended execution of the Wheat Act. I can see no sufficient ground for holding otherwise. The appellants themselves in their points of claim say that the payments were exacted by the respondents colore officii. That being so, the statute protects the respondents against any suit for recovery of these exactions not brought within six months of the date of the exactions. This enables the respondents to retain 641*l.* 17*s.* 1*d.* of the sum of 2554*l.* 2*s.* 3*d.* sued for, leaving a balance of 1912*l.* 5*s.* 2*d.* for which judgment will go out, with a declaration of immunity as regards the consignments ex *Maartje* and ex *Deneb*, in terms of the order by Roche J. of May 9, 1934, which I move your Lordships to restore with costs in this House and in the Court of Appeal.

Order of the Court of Appeal in part complained of in the appeal reversed: judgment of Roche J. thereby set aside restored: Ordered that the respondents pay to the appellants the costs incurred by them in the Court of Appeal, and also the costs incurred by them in respect of the said appeal to this House: Further ordered that the cause be remitted back to the King's Bench Division of the High Court of Justice, to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 22, 1936.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondents: *Parker, Garrett & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* G. W. EATON-TURNER . . . . APPELLANT;

1936
Oct. 15.

AND

T. McKENNA (INSPECTOR OF TAXES) . . RESPONDENT.

Revenue—Income Tax—Profits arising from employment—Employment wholly outside United Kingdom—Employee resident in United Kingdom—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 1; *r.* 18, *sub-s.* 5—*Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 18, *sub-s.* 1.

A person resident in the United Kingdom was employed by an English company as manager of a mining estate in West Africa, where his work was exclusively carried on. By his agreement with the company his salary was to be paid as he directed and was by his direction paid in England:—

Held, that by virtue of s. 18, sub-s. 1, of the Finance Act, 1922, the payments of salary were subject to income tax under Sch. E to the Income Tax Act, 1918, and that by r. 18, sub-s. 5, of the Rules applicable to Sch. E he could be assessed and charged by Commissioners acting in this country.

Colquhoun v. *Brooks* (1889) 14 App. Cas. 493, distinguished.

Order of the Court of Appeal [1936] 1 K. B. 1, affirmed.

APPEAL from an order of the Court of Appeal. (1)

One G. W. Eaton-Turner, a person residing in the United Kingdom, was employed by the Ashanti Goldfields Corporation, Ld., as manager of that Company's mines in West Africa. All the duties of his employment fell to be performed outside the United Kingdom. Having been assessed to income tax for the years from 1926–1927 to 1933–1934 inclusive under Sch. E of the Income Tax Act, 1918, as amended by s. 18 of the Finance Act, 1922, in respect of the remuneration received by him from his employment, he appealed against the assessments. The Commissioners for the Special Purposes of the Income Tax Acts discharged the assessments as regards the earnings of Mr. Eaton-Turner up to September 7, 1932, from which date he admitted that he was liable to income tax,

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD ROCHE.

(1) [1936] 1 K. B. 1.

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inasmuch as his duties then ceased to be wholly performed outside the United Kingdom. The Inspector of Taxes being dissatisfied with this decision, a case was stated for the opinion of the High Court. It was heard by Singleton J., who decided in favour of the Inspector of Taxes. (1) Mr. Eaton-Turner appealed to the Court of Appeal. That Court (Lord Hanworth M.R. and Romer and Maugham L.JJ.) affirmed the decision of Singleton J. and dismissed the appeal. (2) Mr. Eaton-Turner appealed to this House.

By s. 1 of the Income Tax Act, 1918, it is provided that: "Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the Schedules A, B, C, D, and E, contained in the First Schedule to this Act and in accordance with the Rules respectively applicable to those Schedules." By s. 1 of Sch. D: "Tax under this Schedule shall be charged in respect of:—(*a*) The annual profits or gains arising or accruing:—

(i.) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere; and

(ii.) to any person residing in the United Kingdom from any trade, profession, employment or vocation whether the same be respectively carried on in the United Kingdom or elsewhere." . . . .

By s. 2: "Tax under this Schedule shall be charged under the following Cases respectively; that is to say:—

Case I. Tax in respect of any trade not contained in any other Schedule.

Case II. Tax in respect of any profession, employment, or vocation not contained in any other Schedule. . . . .

Case V. Tax in respect of income arising from possessions out of the United Kingdom . . . .

and subject to and in accordance with the Rules applicable to the said Cases respectively."

Rule applicable to Case I.: "The tax shall extend to every trade carried on in the United Kingdom or elsewhere, and shall be computed on the full amount of the balance of the profits or gains."

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(1) [1935] 1 K. B. 466.

(2) [1936] 1 K. B. 1.

Rule applicable to Case II. : "The tax shall extend to every employment by retainer in any character . . . . and to all profits and earnings of whatever value arising from employments, and shall be computed on the full amount of the balance of the profits . . . . of the professions, employments or vocations . . . . as in Case I."

Rules applicable to Case V. :

. . . ." 2. The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom." . . . .

Schedule E.

"Tax under this Schedule shall be charged in respect of every public office or employment of profit." . . . .

Rules applicable to Sch. E :

" 1. Tax under this Schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this Schedule, or to whom any annuity, pension, or stipend, as described in this Schedule is payable.

. . . .

" 6. The tax shall be paid in respect of all public offices and employments of profit in the United Kingdom or by the officers hereinafter respectively described namely . . . . (*h*) offices or employments of profit under any company or society, whether corporate or not corporate . . . . (*k*) all other public offices, or employments of profit which are of a public nature. . . . .

" 18—(5.) Notwithstanding anything in this rule, a person may be assessed and charged under this Schedule by the Commissioners acting for any parish in which he ordinarily resides."

By s. 18, sub-s. 1, of the Finance Act, 1922: "Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to Income Tax under Schedule D (other than the profits or gains chargeable under Case V. of Schedule D, or under Rule 7 of the Miscellaneous Rules applicable to Schedule D), shall cease to be chargeable under that Schedule and shall be chargeable to tax under Schedule E, and the Rules applicable to that Schedule shall apply accordingly subject to the provisions of this Act."

Raymond Needham K.C. and *Cyril King* for the appellant. The Income Tax Acts do not charge any person, whether residing in the United Kingdom or not, with tax upon the profits of an employment carried on wholly outside the United Kingdom: *Colquhoun* v. *Brooks*. (1) The tax is imposed upon the profits of trades, professions and vocations. If the profits of a trade wholly carried on outside the United Kingdom are not taxable, it follows that the profits of an employment wholly carried on outside the United Kingdom are not taxable either, because Sch. D, s. 1 (*a*) (ii.), applies to both these sources of income. No doubt one reason why this House held in *Colquhoun* v. *Brooks* (1) that profits of an employment carried on abroad were not taxable was that there was no machinery here for taxing them, and it is true that since the passing of s. 32 of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), "a person may be charged to income tax under Sch. D or E, whether or not he is engaged in any trade, manufacture, adventure or concern, or any employment, vocation, or office, by commissioners acting for any parish or place in which that person ordinarily resides" . . . .; and by s. 18, sub-s. 1, of the Finance Act, 1922, "such profits and gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act,

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(1) 14 App. Cas. 493.

1918, chargeable to Income Tax under Schedule D (other than the profits or gains chargeable under Case V. of Schedule D)"—relating to possessions abroad—" or under Rule 7 of the Miscellaneous Rules applicable to Schedule D"—relating to interest on foreign and Colonial stocks and Indian funds entrusted to agents for payment in the United Kingdom—" shall cease to be chargeable under that Schedule and shall be chargeable to tax under Schedule E, and the Rules applicable to that Schedule shall apply accordingly subject to the provisions of this Act." But a mere alteration of the means of assessing and exacting the tax does not impose or alter the incidence of a tax.

Foulsham v. *Pickles* (1) and *Thomson* v. *Bensted* (2) were also cited.

Sir Donald Somervell A.-G. and *Reginald Hills* for the respondent were not called on.

1936. Oct. 15. LORD ATKIN. My Lords, this is an appeal from an order of the Court of Appeal which dismissed an appeal by the appellant from an order of Singleton J. The learned judge had allowed an appeal by the Crown on a case stated by the Special Commissioners, who had decided in favour of the appellant. There are several assessments in question, in respect of years beginning with the year 1926–27 and ending with the year 1931–32.

The appellant was employed by the Ashanti Goldfields Corporation, Ld., as their manager. He began as assistant manager, and he was employed under written contracts under which his duties were, as found by the Special Commissioners, to be wholly performed outside the United Kingdom—namely, in West Africa. A condition of the contracts was that payments were to be made as he directed, and he did in fact direct that payments should be made in this country. The greater part of the payments were, therefore, in fact made by his employers to him in this country; but for the purposes of this case, in the view which your Lordships are taking of it, that, I think, is probably irrelevant.

(1) [1925] A. C. 458.

(2) 1919 S. C. 8.

The appellant is assessed under Sch. E by reason of a provision in the Finance Act, 1922, which, by s. 18, sub-s. 1, provides: "Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to Income Tax under Schedule D" (with certain exceptions) "shall cease to be chargeable under that Schedule and shall be chargeable to tax under Schedule E, and the Rules applicable to that Schedule shall apply accordingly subject to the provisions of this Act." Therefore the question which arises is whether or not these profits or gains were profits or gains which would be chargeable to income tax under Sch. D of the Act of 1918. Sect. 1 of the Act of 1918 provides: "Where any Act enacts that Income Tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the Schedules marked A, B, C, D and E, contained in the First Schedule to this Act and in accordance with the Rules respectively applicable to those Schedules." Sch. D provides as follows, by para. 1: "Tax under this Schedule shall be charged in respect of:—(*a*) The annual profits or gains arising or accruing:—(i.) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere; and (ii.) to any person residing in the United Kingdom from any trade, profession, employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere." Then by para. 2 it is provided that: "Tax under this Schedule shall be charged under the following Cases respectively; that is to say: . . . . Case II. Tax in respect of any profession, employment, or vocation not contained in any other Schedule." The reference there is, no doubt, to employments of a public nature which were originally taxed under Sch. E.

The appellant in this case has carried on his employment exclusively outside the United Kingdom, and he says that he is not properly taxable under Sch. D, or at any rate not under Sch. D, Case II., in respect of profits or gains arising from the employment, because his employment was not an employment within the United Kingdom, but was an employment exclusively outside the United Kingdom. The answer to that is obvious on the plain statement of the words, because the Act says that tax shall be charged "to any person residing in the United Kingdom from any trade, profession, employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere"; and the appellant was, as is found, resident in the United Kingdom during the whole of this period. It would therefore look as though there were a very heavy onus on the appellant to show why he should not be charged in accordance with what would seem to be the plain meaning of the Act. But he says he can show that, because the words in para. 1 (ii.) of Sch. D (which relates to any person residing in the United Kingdom), "from any trade, whether carried on in the United Kingdom or elsewhere," were considered in the well known case of *Colquhoun* v. *Brooks* (1) in the year 1889. In that case Mr. Brooks resided in the United Kingdom, and he derived profits from a trade which was carried on in Australia, in which he was a partner. It was held that he could not be assessed upon the whole of the profits arising from that trade, but only from so much as was remitted to this kingdom. The appellant here says, by analogy, that inasmuch as the House of Lords, affirming the Court of Appeal, decided that some limit must be put on those extensive words in respect of trade, a corresponding limit must be imposed on the words in respect of employment. That has involved a consideration of the case of *Colquhoun* v. *Brooks.* (1)

Now when that case is looked at, it is plain from the language of the noble Lords who delivered opinions in this House that in their Lordships' opinion the appellant was obviously within the meaning of the charging words, but it was also pointed out that general words of that kind might have to be cut down, because general words in one part of a section or one part of an Act cannot be construed without having regard to all that is contained in the Act, and a series

(1) 14 App. Cas. 493.

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of considerations were referred to leading to the view that in respect of trade these words ought to be cut down; first of all that the machinery was hopelessly defective for charging a person in respect of a trade which was carried on wholly abroad. Lord Macnaghten said (1): "When one tries to apply the rules and provisions of the Act relating to profits and gains from trades to a trade carried on exclusively abroad one gets into hopeless difficulties." He pointed out that in respect of a partnership business the return had to be made by the senior partner resident in Great Britain, and that the return bound all the other partners, and no other partner could make a separate return at all; again that the computation of the duty was to be exclusive of profits arising from lands occupied, a rule which would be very difficult to apply to a trade carried on abroad; then, that every person engaged in trade was chargeable by the Commissioners acting for the parish or place where the trade was carried on, and that was obviously inapplicable to a case where the trade was carried on in Australia. Then, and conclusively in the view of the noble and learned Lords, that the particular profits were really charged under Case V., which deals with tax in respect of income arising from possessions out of the United Kingdom; and having found that the machinery was inapplicable to a trader who derived profits here from trade carried on abroad, and that there was a case which expressly charged him in respect of his interests in that trade abroad, they came to the conclusion that there was sufficient ground, and clear ground, for cutting down those general words. That decision has been followed ever since, and neither this House nor any member of this House is likely to say anything in criticism of that decision.

But how does that reasoning apply to the present case? We have sought to extract from counsel for the appellant, who have, as usual, said everything that could be said on behalf of their client, some statement of what are the provisions in the present Act which would appear to be inconsistent with the intention to charge the holder of an

(1) 14 App. Cas. 515.

employment in respect of an employment which was exercised abroad; and, my Lords, there are none. The provision about machinery does not apply. There was a time when it did, and when this Schedule was first passed no doubt there would have been, or might have been, a difficulty in charging a person in respect of profits derived from an employment which was carried on abroad, because the person would have to be assessed at the place where the business or employment was in fact conducted. But that was remedied as long ago as 1915, and there is now no such difficulty. And while it is perfectly true that a deficiency in the machinery for collection is an element to be taken into account in construing an Act of Parliament and deciding whether its words are to be given their plain meaning or whether they are to be read in a restricted sense, at the same time it is by no means conclusive. There may very well be cases where there was an intention to charge but where the Legislature have failed, through some neglect or improvidence, to provide the necessary machinery. The machinery has now been provided, and in the Act of Parliament as now passed there is no difficulty at all about the machinery. But the other and conclusive element in *Colquhoun* v. *Brooks* (1) is entirely lacking. There is no case at all to which this matter can be referred. In *Colquhoun* v. *Brooks* (1) the existence of Case V. dealing with foreign possessions induced the members of the House of Lords to say that there was a case applicable to the matters before them, and therefore the mere general words were not to be relied on; but in the present case it is sufficient to say that by common consent this is not a case of a foreign possession. I need not discuss the case of *Foulsham* v. *Pickles* (2), which was decided by this House, and which expressly held that an employment exactly on all fours with the employment here could not be said to be a "foreign possession"; and I need not allude to any difficulties that might arise from the conception of an employment being a "possession" at all. Therefore, inasmuch as there is no difficulty about the machinery and there is no alternative case and the words are absolutely clear on the face of them and as wide as they can be, and expressly refer to employment outside this country as well as employment within the country, I for my part find insuperable difficulty in seeing that the appellant here ought to succeed in his contention that he has shown that the wide words of the Act are necessarily to be cut down.

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(1) 14 App. Cas. 493.

(2) [1925] A. C. 458.

There is one other matter that arises on the case. It is said that s. 18 of the Finance Act, 1922, which I have read, transfers the profits or gains chargeable under Sch. D to Sch. E, and says that the Rules applicable to that Schedule shall apply accordingly; and then it is said that when you look at the Rules applicable to Sch. E you will find r. 6, which says that "the tax shall be paid in respect of all public offices and employments of profit within the United Kingdom," and therefore it is said that those Rules cannot apply, and that Sch. E cannot apply, and although you may have transferred this employment from Sch. D to Sch. E, you have not found a home for it in Sch. E, and it must wander between earth and heaven because apparently it is not in Sch. D, neither is it in Sch. E.

My Lords, in my opinion that is much too technical a view, and an incorrect view of the construction. The Rules of Sch. E are intended to be applied so far as they are applicable. Once it is decided, as I venture to think your Lordships must hold, that this particular profit was chargeable under Sch. D, then it is transferred to Sch. E, and the assessment is properly made in those circumstances. Therefore I think that the opinions of the learned judges below, which express exactly the view which I have put before your Lordships, were right, and I suggest to your Lordships that the appeal should be dismissed.

LORD THANKERTON. My Lords, I concur in the reasons which have just been given by my noble and learned friend on the Woolsack and also in the conclusions at which he has arrived, and I have very little to add.

The main argument of the appellant in this case is based on the decision of the case of *Colquhoun* v. *Brooks* (1); but when properly examined it appears to me that *Colquhoun* v. *Brooks* (1) really is sufficient to decide the case against the appellant, and for these reasons. *Colquhoun* v. *Brooks* (1) was a case first of all of a trade, and a trade carried on exclusively in Australia. This is the case of an employment; but in that respect I doubt whether there is so much distinction as regards the argument. But, secondly, in *Colquhoun* v. *Brooks* (1) it was held by this House that the case could possibly fall under Case V., and it is expressly conceded in the present case that it cannot fall under Case V. That is the first distinction. Further, in *Colquhoun* v. *Brooks* (1) this House, as expressed in the opinions which were delivered, was very clearly of opinion that the language of Case I. was apt to cover the case there unless on a consideration of the whole provisions of the statute there were reasons found why the full meaning should not be attributed to Case I.; and their Lordships then went on to consider the other provisions. Both Lord Herschell and Lord Macnaghten gave three reasons, and the same three reasons, why a more limited construction should be applied to Case I., and Case V. should be preferred. As my noble and learned friend has pointed out, not one of those three reasons applies in the present case. The first two reasons, which were founded on the fact that it was a trade with a partnership, do not apply to an employment at all, and the third reason, which related to the place at which the person might be assessed, has been superseded as regards the present case, not, as assumed by the judgments in the Court of Appeal, by the provision of Miscellaneous Rule 4 applicable to Sch. D, sub-s. 1 (*b*), but by r. 18, sub-s. 5, of the Sch. E Rules. That, however, is a mere matter of detail; both these Rules were amended by the Finance (No. 2) Act, 1915, s. 32, at the same time and in the same section.

That being the case, it seems to me, my Lords, that the initial view of their Lordships in *Colquhoun* v. *Brooks* (1), namely, that you must give effect to the clear words of

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the Case—in this case Case II. and not Case I.—unless you find reasons elsewhere in the statute for a more limited construction, applies in the present case, and that no adequate reason has been produced in the present case for applying that more limited construction. Consequently I agree with the conclusion at which my noble and learned friend on the Woolsack has arrived. On the second point, as to the construction of s. 18 of the Act of 1922, I have nothing to add.

LORD RUSSELL OF KILLOWEN. My Lords, I agree with the motion proposed, and I have nothing to add.

LORD MACMILLAN. My Lords, I also agree.

LORD ROCHE. My Lords, I also agree.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, October 15, 1936.

Solicitors for the appellant: *Dawson & Co.*
Solicitor for the respondent: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)*
1936
Nov. 27.

SIR SAMUEL EDWARD SCOTT, BARONET, AND COUTTS AND COMPANY . . . . APPELLANTS;

AND

THE COMMISSIONERS OF INLAND REVENUE . . . . RESPONDENTS.

Revenue—Estate duty—Settlement—Tenant for life in possession—Purchase of contingent reversionary life estate—Settlement on discretionary trusts—Falling into possession of reversionary life estate—Death of tenant for life in possession—Passing of property to beneficiary under discretionary trust—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1.

By a deed of settlement made in July, 1889, the Fifth Earl of C. and his eldest son settled the C. Estates to the use of the eldest son as tenant for life with remainder to the use of his sons successively in tail male and in default of such issue to the use of the second son of the said Fifth Earl for life with remainder to the use of his sons successively in tail male with remainders over. In 1893 the Fifth Earl bought the life estate of his said second son, and this interest was conveyed to trustees their heirs and assigns for the life of the said second son upon discretionary trusts in favour of the said second son, his wife, and his children or remoter issue and, subject to this trust, upon trust to accumulate the surplus of the rents and profits, invest it, and apply the proceeds in discharging debts or incumbrances upon the estates, with a proviso limiting the duration of this trust.

In 1908 the eldest son of the Fifth Earl died. In 1910 the only son of that son died. In 1915 the Fifth Earl died and was succeeded by his said second son as Sixth Earl and the life estate of the Sixth Earl became an estate in possession. In 1933 the Sixth Earl died and was succeeded by his only son as Seventh Earl and tenant in tail male in possession of the estates:—

Held, that estate duty became payable on the death of the Sixth Earl when the property passed to the Seventh Earl and his estate became an estate in possession instead of an estate in remainder; that he then became entitled to receive the whole income of the property which was formerly applicable for the benefit of the objects of the discretionary trust, and that it mattered not that he was himself one of the objects of that trust.

Order of the Court of Appeal [1936] 1 Ch. 246 affirmed.

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD ROCHE.

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SIR S. E. SCOTT, BT., AND COUTTS & CO. *v.* INLAND REVENUE COMMISSIONERS.

APPEAL from an order of the Court of Appeal (1).

Immediately before the execution of two deeds of settlement dated respectively July 26 and July 27, 1889, and hereinafter referred to as the Chelsea Settlement and the Culford Settlement, the Cadogan freehold estates situate in Chelsea and elsewhere in Middlesex and other estates situate in the parishes of Culford and Ingham in the county of Suffolk stood limited to the Fifth Earl Cadogan for his life with remainder to such uses as the Fifth Earl and his eldest surviving son Henry Arthur Viscount Chelsea should jointly appoint. By the Chelsea Settlement and the Culford Settlement the Fifth Earl and his eldest son appointed that the estates should (subject to the Fifth Earl's life estate) be to the use of the said Henry Arthur Viscount Chelsea for life, with remainder to the use of his sons successively in tail male, and in default of such issue to the use of Gerald Oakley Cadogan (the Fifth Earl's second son) for life, with remainder to the use of his sons successively in tail male, with remainders over.

The Chelsea Settlement also settled certain plate and jewels as heirlooms upon the person who was for the time being entitled for life or for any greater estate to the actual possession or to the receipt of the rents and profits of the real estate thereby settled.

By a conveyance dated December 21, 1893, made between Gerald Oakley Cadogan and the Fifth Earl, after reciting that under the limitations contained in the Chelsea Settlement and the Culford Settlement the said Gerald Oakley Cadogan was entitled to an estate for life in the settled property in remainder as therein mentioned and that the Fifth Earl had agreed to purchase from the said Gerald Oakley Cadogan his said estate for life in the settled property at the price of 2000*l.*, the said Gerald Oakley Cadogan in consideration of the sum of 2000*l.* granted and assigned all the settled property unto the Fifth Earl to hold the same unto his heirs and assigns and his executors, administrators and assigns for all the life of the said Gerald Oakley Cadogan.

This life interest was subsequently settled by an indenture of

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June 18, 1894, made between the Fifth Earl and two trustees, whereby after reciting that he was desirous of making provision for his son Gerald Oakley Cadogan and the wife and issue of his said son in the event of his expectant life interest falling into possession, the Fifth Earl conveyed to trustees the settled property to hold the same unto and to the use of the trustees their heirs and assigns for all the life of the said Gerald Oakley Cadogan upon certain trusts of which the following became operative, namely, that the trustees should enter into possession of the rents and profits of and manage the estates and pay all annual sums and interest charged upon the estates and should during the remainder of the life of the said Gerald Oakley Cadogan or any shorter period as the trustees should think fit pay all or any part of the net rents and profits of the said premises unto or apply the same for the maintenance or personal support or benefit of all or any one or more to the exclusion of the others or other of the following persons, namely, the said Gerald Oakley Cadogan and his wife (if any) and his children or remoter issue (if any) for the time being interested in remainder in the premises as the trustees should in their absolute discretion think proper, and subject to the said discretionary power should accumulate the surplus (if any) and invest the same and hold the accumulations and investments upon trust as and when the trustees should think fit to realize the said investments and apply the proceeds towards the discharge of any debts or incumbrances charged upon or affecting the estates, or if there should be no such debts or incumbrances then to hold the accumulations as if the same were capital moneys arising under the Settled Land Acts, provided always that in the event of the said Gerald Oakley Cadogan surviving the Fifth Earl for more than twenty-one years the accumulation of any surplus income should after the expiration of such twenty-one years cease, and the surplus should thenceforth be paid to the person or persons who would for the time being be entitled to the income of the estates if the said Gerald Oakley Cadogan were dead.

In the year 1908 during the lifetime of the Fifth Earl his eldest son Henry Arthur Viscount Cadogan died. Two years later the only son of the latter died an infant and unmarried. On March 6, 1915, the Fifth Earl died, with the result that his son Gerald Oakley Cadogan succeeded to the title as Sixth Earl, and his life estate became an estate in possession. The Sixth Earl died on October 4, 1933, and was succeeded by his only son, who thus became the Seventh Earl and tenant in tail male in possession of the estates.

In these circumstances the trustees of the settlements took out a summons to determine the question whether (1.) the estates settled by the Chelsea Settlement; (2.) the estates settled by the Culford Settlement; (3.) the Chelsea heirlooms passed on the death of the Sixth Earl within the meaning of s. 1 of the Finance Act, 1894. The summons was heard before Bennett J., who held that the said estates and heirlooms passed and that estate duty was payable on the death of the Sixth Earl. The trustees appealed, and the Court of Appeal affirmed the decision of Bennett J.

The trustees appealed to this House.

1936. Oct. 19. *Fergus D. Morton K.C.* and *Wilfrid M. Hunt* for the appellants. None of this property passed on the death of the Sixth Earl. In the lifetime of the Fifth Earl the Seventh Earl was tenant in tail of the estates, and absolutely entitled to the heirlooms subject only to a defeasance if he failed to reach the age of twenty-one years. Since the death of the Fifth Earl no person but the Seventh Earl had any beneficial estate or interest in any of the settled property. Subject only to the exercise of discretionary powers the trust for accumulation continued in existence from the death of the Fifth Earl to the death of the Sixth Earl and was for the benefit of the Seventh Earl. None of the objects of the discretionary powers had any estate or interest in the settled property and therefore there could not be any passing of property from them; but in order that property may pass within the meaning of s. 1 of the Finance Act, 1894, there must be a person from whom and a person to whom it passes.

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This case therefore falls within the principle of *Attorney-General* v. *Beech.* (1)

[*Adamson* v. *Attorney-General* (2) and *Attorney-General* v. *Lloyds Bank Ld.* (3) were also cited.]

Sir Donald Somervell A.-G., Sir Terence O'Connor S.-G., and *J. H. Stamp* for the respondents were not called on.

Oct. 20. The House took time for consideration.

Nov. 27. LORD RUSSELL OF KILLOWEN. My Lords, the question in dispute in this case is whether Estate Duty became payable on the death of the Sixth Earl Cadogan in respect of property comprised in two settlements which were executed respectively on July 26 and 27, 1889.

It will, I think, be sufficient if I state the facts relating to the Cadogan freehold estates situate in Chelsea and elsewhere in the County of Middlesex, which were comprised in the settlement of July 26, 1889. Immediately before the execution of that deed they stood limited (subject to certain charges) to the Fifth Earl Cadogan for his life, with remainder to such uses as the Fifth Earl and his eldest surviving son Henry Arthur Viscount Chelsea should by any deed or deeds jointly appoint. By the settlement of July 26, 1889, the Fifth Earl and his eldest son exercised their joint power of appointment and appointed that the estates should (but subject to the Fifth Earl's life interest and all interests having priority over their joint power) be and remain from and after the decease of the Fifth Earl to the use of Henry Arthur Viscount Chelsea for life, with remainder to the use of his sons successively in tail male, and in default of such issue to the use of Gerald Oakley Cadogan (the Fifth Earl's second surviving son) for life with remainder to the use of his sons successively in tail male, with remainders over.

In the year 1893 the Fifth Earl bought the life interest of his son Gerald under the settlement. This life interest was then of small value, being a life estate which could only become an interest in possession on the deaths of his father and elder brother and the default or failure of the latter's male issue. The purchase included his life interest in all the property comprised in both settlements. The life interest so purchased was subsequently settled by the Fifth Earl by an indenture dated June 18, 1894. The terms of that deed are important and require attention; but before examining them let me indicate the events which subsequently occurred and which have given rise to the problem which we are called upon to solve.

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(1) [1889] A. C. 53.

(2) [1933] A. C. 257.

(3) [1935] A. C. 382.

The unexpected happened. In the year 1908 and during the lifetime of the Fifth Earl, his eldest surviving son, Henry Arthur Viscount Chelsea, died. Two years later the latter's only son died, an infant and unmarried. On March 6, 1915, the Fifth Earl died, with the result that his son Gerald succeeded to the title as Sixth Earl, and his life estate became an estate in possession. It was vested in the trustees of the indenture of June 18, 1894, upon the trusts thereby declared. The Sixth Earl died on October 4, 1933, and was succeeded by his only son, who thus became the Seventh Earl and tenant in tail male in possession of the estates. The question is whether the property passed on the death of the Sixth Earl within s. 1 of the Finance Act, 1894.

I now turn to the provisions of the indenture of June 18, 1894. It is made between the Fifth Earl and two trustees, and it recites that the Fifth Earl was desirous of making a provision for his son Gerald and his wife and issue (if any) in the event of his expectant life interest falling into possession in manner thereinafter appearing. By it the Fifth Earl conveyed to the trustees the settled property to hold the same unto and to the use of the trustees, their heirs and assigns, for all the life of Gerald, but upon the trusts and with, under and subject to the powers and provisions thereinafter contained concerning the same. The first trust declared by the deed never came into operation owing to the fact that Gerald was adjudicated a bankrupt in the year 1911. The relevant trusts which became operative were as follows:—namely, that the trustees should enter into possession or receipt of the rents and profits and manage the estates (with power to maintain "Chelsea House") and pay all annual sums and

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interest charged on the estates and should during the remainder of the life of the Sixth Earl or any shorter period or periods as the trustees should think fit pay all or any part of the net rents and profits of the said premises after making the payments thereinbefore authorized, unto or apply the same for the maintenance or personal support or benefit of all or any one or more to the exclusion of the others or other of the persons therein mentioned—namely, the Sixth Earl, his wife (if any), his children or remoter issue (if any), and the other persons for the time being interested in remainder in the premises thereby conveyed as the said trustees or trustee should in their or his absolute discretion think fit, and should during such period and at such discretion as aforesaid permit all or any of the said persons to occupy all or any of the said premises, and subject to the said discretionary trust or power should accumulate the surplus (if any) and invest the same and should hold such accumulations and the investments thereof upon trust as and when the said trustees or trustee should in their or his discretion think fit to realize the said investments or any part thereof and apply the proceeds thereof in or towards the satisfaction and discharge of any debts or incumbrances for the time being charged upon or affecting the estates or any part thereof, or if there should be no such debts or incumbrances or the same should have been fully paid or satisfied, then the said trustees or trustee should hold the accumulations then made or thereafter to be made under the trust or power in that behalf thereinbefore contained, as if the same were capital moneys arising under the Settled Land Acts, provided always that in the event of the Sixth Earl surviving the Fifth Earl for more than twenty-one years the accumulation of any surplus income should after the expiration of such twenty-one years cease, and such surplus should be thenceforth paid to the person or persons who would for the time being be entitled to the income of the estates if the Sixth Earl were dead or should permit the said premises to be occupied and enjoyed by such person or persons.

It will be seen that the result of this disposition by the

Fifth Earl of the life estate of the Sixth Earl was that immediately before the death of the Sixth Earl the income of the property had to be applied in payment to or for the benefit of all or any of the objects of the discretionary trust, or (in so far as not so applied) in accumulation and the payment off of incumbrances. The persons beneficially interested in the income of the property at that moment were therefore the various persons who were objects of the discretionary trust and the persons who might ultimately benefit by the accumulations and discharge of incumbrances.

Immediately after the death of the Sixth Earl the only person interested in the income was the Seventh Earl as tenant in tail male in possession.

Did the property pass to him, within the meaning of s. 1 of the Finance Act, 1894, on the death of the Sixth Earl? If there had been no purchase of the Sixth Earl's life estate the property would clearly have so passed. If there had been no settlement of the purchased life estate by the Fifth Earl, and some one (not the Seventh Earl) had enjoyed the estate pur autre vie as a devisee from the Fifth Earl or as a purchaser from his executors, again no question could have arisen. On the death of the Sixth Earl the property would have so passed from that tenant pur autre vie to the Seventh Earl.

It is said, however, that it is possible to have such a dealing with a life estate under a settlement that on the death of the tenant for life the property will not so pass, and for this proposition is cited the case of *Attorney-General* v. *Beech* (1) in which the tenant for life had surrendered her life estate to the remainderman in fee, with the consequent result that, upon the merger which ensued, the remainderman had long before the death of the tenant for life become a tenant in fee simple in possession. In those circumstances it was obviously impossible that the property could have passed on the death of the tenant for life.

It was, however, argued by the appellants that the dealing with the Sixth Earl's life interest was equally of such a nature as to prevent the property from passing on his death. It was said that in order to constitute a passing of property on death there must be a passing beneficially from some person or persons to another person or persons; that no beneficial interest existed in a person whose only interest was his chance of participating as an object of the discretionary trust; that the only person who could be said to be beneficially interested in the property during the period which elapsed between the deaths of the Fifth and Sixth Earls was the Seventh Earl in respect of his estate in tail male in remainder, and in respect of the trusts for accumulation, and payment off of incumbrances; and that accordingly there could not on the Sixth Earl's death have been any passing beneficially from some person or persons to another person or persons.

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(1) [1899] A. C. 53.

Bennett J. and the Court of Appeal have reached the conclusion that on the death of the Sixth Earl the property did pass to the Seventh Earl, and in my opinion their decision was correct.

On the death of the Sixth Earl the Seventh Earl's estate in tail male became, instead of an estate in remainder, an estate in tail male in possession. He became entitled to receive the whole income of the estate, which immediately before the death of the Sixth Earl was primarily applicable for the benefit of the objects of the discretionary trust. That in my opinion was a change of hands in the beneficial title or possession of the property as a whole occurring on the death of the Sixth Earl, which constituted a passing of the property on that death within the meaning of s. 1 of the Finance Act, 1894.

In the Court of Appeal Romer L.J. pointed out in detail the contrast between the beneficial enjoyment of the property before and after the death of the Sixth Earl, and I agree with him when he says that on that death the beneficial enjoyment passed to the Seventh Earl from the class of objects of the discretionary trust, and none the less because the Seventh Earl was himself a member of the class. As Maugham L.J. expresses it, the Seventh Earl had himself during the Sixth Earl's life no interest in any defined slice or portion of the property (his only interest being the possibility of benefit under the discretionary trust); but on the death of the Sixth Earl the discretionary trust ended and the Seventh Earl became entitled in possession to the property as a whole.

Reference was made in the course of the argument to the *Adamson* case. (1) I agree with Bennett J. that that decision has no relevance to the present case. Lord Tomlin in the *Lloyds Bank* case (2) and Maugham L.J. in the present case have stated the grounds upon which the majority based their decision that no property passed under s. 1. They can have no application to the matters now in debate.

I would like, however, as one of the majority in that case, and in view of observations recurring (if not concurring) elsewhere, to state in fuller detail the foundation of that decision. The fund under consideration was the fund as it existed at the moment of the settlor's death—namely, the original capital increased by accumulations of so much of the income as had not been paid or applied under clause 4 of the settlement, but less so much capital as had been applied under clause 3 of the settlement. The question to be answered was had *that* fund passed on the death of the settlor. To answer that question a comparison must be made between the persons beneficially interested in *that* fund the moment before the death, and the persons so interested the moment after the death. The only persons beneficially interested in *that* fund immediately before the death were the son and the daughters, though their interests were liable to be altered or defeated by some act of the settlor, or by the happening of some event in his lifetime. His death merely rendered any such act or event an impossibility. The son and daughters remained beneficially interested in the same shares and to the same extent as before, but their interests were no longer subject to alteration or defeat. They claimed under the same title as before. There was no changing hands. Therefore the fund in question did not pass on the death.

My Lords, I have only dealt with the question whether the Chelsea estates passed under s. 1 on the death of the Sixth

(1) [1933] A. C. 257.

(2) [1935] A. C. 382.

Earl and I have no doubt that they did. The same question also arose as to other properties, or items of property, described in the originating summons herein under the letters (B), (C), (D), (E) and (G). I do not trouble you with any remarks thereon beyond saying that it was not disputed that the items (B), (C), (D) and (E) (1) also passed on the death, if the Chelsea estates so passed; and as to item (G) it was conceded by the appellants in the course of the argument before this House that that item passed on the death and that Estate Duty was payable in respect thereof.

In my opinion this appeal should be dismissed with costs.

My Lords, I am authorized to say that my noble and learned friends Lord Atkin, Lord Thankerton and Lord Macmillan concur in the opinion which I have expressed.

LORD ROCHE. My Lords, I also concur.

Order of the Court of Appeal complained of affirmed, and appeal dismissed with costs.

Lords' Journals, Nov. 27, 1936.

Solicitors for appellants: *Lee & Pembertons.*

Solicitor for respondents: *The Solicitor of Inland Revenue.*

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(1) (B) comprised the capital moneys subject to the Chelsea Settlement; (C) the Chelsea heirlooms; (D) the hereditaments subject to the Culford Settlement, and (E) the capital moneys subject to that Settlement.

Applied. GOLD COAST SELECTION TRUST, LTD. *v.* HUMPHREY. [1948] 2 All E.R. 379.

[HOUSE OF LORDS.]

HARRISON (INSPECTOR OF TAXES) . . APPELLANT;

AND

JOHN CRONK AND SONS, LIMITED . RESPONDENTS.

H. L. (E.)*

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Considered. CHIBBETT (INSPECTOR OF TAXES) *v.* HAROLD BROOKFIELD & SON LD. [1952] 2 Q.B. 677

Revenue—Income Tax—Profits of trade—Deductions—Sums deposited with Building Society by Builder—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

A Company carried on the business of buying land, building thereon small houses, and selling the houses and portions of the land. At the request of the Company a building society advanced to an intending purchaser of a house the whole of the purchase money upon a mortgage of the purchaser's interest in the house. The purchase money was repayable with interest thereon in equal monthly instalments. Part only of the purchase money was paid to the Company and the balance was retained by the building society as a deposit by the Company until the purchaser had repaid an agreed part of the purchase money. The sum deposited was then released. In the meantime the society allowed the Company interest upon the amount deposited:—

Held, that sums so deposited by the Company, if capable of valuation, should be valued for the purposes of income tax under Case I. of Sch. D. of the Income Tax Act, 1918; but that if not capable of valuation they should be treated as liable to tax only when they were released to the Company.

APPEAL from an order of the Court of Appeal.

Messrs. John Cronk & Sons, Ld. (hereinafter called "the builders") from time to time purchased land upon which they made roads and sewers and erected small dwelling-houses, which they sold at prices between 500*l.* and 600*l.* To accommodate persons who could not conveniently pay cash, the builders made an agreement with a building society whereby the building society advanced to an intending purchaser on mortgage the whole of the purchase money of a house and the builders guaranteed the society repayment of a proportion of the sum advanced, and deposited the whole or a part, usually one-third, of the sum guaranteed. The building society allowed the builders interest on the amount deposited.

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD ROCHE.

The agreement in the present case was as follows : " Whereas the society " (the building society) " has at the request of the guarantor " (the builders) " advanced to " (the purchaser) " upon the security of a mortgage of the estate of the said " (purchaser) " in a property " (named) " 575*l.* repayable with interest in twenty years by equal monthly instalments of 4*l.* 3*s.* 11*d.* In consideration of the premises it is agreed as follows :

" 1. On the signing of this agreement the guarantor " (the builders) " shall pay to the society 150*l.* upon which the society shall allow the current rate of interest payable on deposits with the society and such sum shall be retained by the society until the said " (purchaser) " or his assigns shall have repaid to the society 300*l.* of the said principal sum of 575*l.* upon the happening of which event the said sum of 150*l.* shall be repaid to and upon the request in writing of the guarantor " (the builders).

" 2. If the society by its directors shall resolve before the said principal sum is reduced by 300*l.* to exercise any mortgagee powers then at any time thereafter the said sum of 150*l.* may be transferred by the society to the credit of the repayment account relating to the mortgage and interest thereon shall cease.

" 3. Notwithstanding the terms of this agreement the following provisions shall apply :

> " (1.) The society as a concession to the guarantor " (the builders) " will only require the " (builders) " primarily to pay and the " (builders have) " paid to the society the sum of 73*l.* 6*s.* 8*d.* only upon the signing of this agreement.
>
> " (2.) (*a*) In consequence and consideration of sub-clause (1.) of this clause the society shall be required to pay interest to the guarantor " (the builders) " upon the said sum of 73*l.* 6*s.* 8*d.* only and in accordance with the terms of this agreement.

"(*b*) The society shall under no circumstances be required to pay to the guarantor " (the builders) " any sum in

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excess of 73*l*. 6*s*. 8*d*. and for the purposes of repayment by the society the sum of 150*l*. hereinbefore mentioned shall mean the sum of 73*l*. 6*s*. 8*d*.

"(3.) If upon the exercise of its mortgagee powers there shall be due to the society in excess of the actual and net amount realized and received by the society for monies due in respect of the mortgage a sum in excess of the said sum of 73*l*. 6*s*. 8*d*. at the option of the society (*a*) the guarantor" (the builders) "will pay to the society on demand such further sum to make up such deficiency, but not exceeding the further sum of 76*l*. 13*s*. 4*d*. or (*b*) the society may withdraw from any other account of the guarantor" (the builders) "a sum not exceeding the said further sum of 76*l*. 13*s*. 4*d*. and no interest shall be payable by the society to the guarantor" (the builders) "upon any sum so withdrawn.

"4. The consent of the guarantor" (the builders) "shall not be required prior to the exercise by the society of any rights and powers contained in the mortgage . . . ."

The actual procedure on the completion of a sale was as follows: The representative of the building society attended at the office of the builders' solicitors and handed to the solicitors a cheque for a sum representing the difference between the amount advanced to the purchaser and the amount of the builders' deposit with the building society. The solicitors paid over the cheque to the builders. The purchaser's title was completed by a deed of transfer by the builders to him in which the builders acknowledged the receipt of the whole purchase price.

In the builders' trade account there was deducted from the sums received from the sales of houses the net amount deposited by them with the building society during the year, i.e., the sums deposited under the guarantees given during the year less any sums received back during the year on the release of sums deposited. The interest received from the building society on the deposits was shown as a receipt in the profit and loss account, but the deposits were not shown as assets in the builders' balance sheet.

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The question was as to the balance of the profits and gains of the trade carried on by the builders and assessable under Case I. of Sch. D of the Income Tax Act, 1918, during the years ending on April 5, 1932, and April 5, 1933.

Before the Commissioners for the Special Purposes of the Income Tax Acts the builders contended that the sums deposited by them with the building society ought not to be treated as receipts of their trade at the time of the sale and purchase of a house, nor at any time before they should be released to them by the building society. The Special Commissioners held that the purchase price of each house was fully paid in cash at the time of each completed sale with a contingent liability on the builders in respect of their guarantee to the building society; and that the whole of the purchase money should on completion of each sale be treated as a receipt of the builders' trade.

The builders appealed by way of special case to the King's Bench Division, and Finlay J. affirmed the decision of the Special Commissioners. The builders then appealed to the Court of Appeal. That Court (Lord Hanworth M.R., Romer and Maugham L.JJ.) held that the sums deposited with the building society should be brought in as trading receipts at the time of each sale, not at their face value but on a proper valuation.

The Inspector of Taxes appealed to this House.

1936. Oct. 16. *Sir Donald Somervell A.-G.* and *Reginald Hills* for the appellant.

On the sale of a house, as between the respondents and their purchaser, the transaction is completed when they execute the transfer and acknowledge the receipt of the purchase money. Why is it to be said that, as between the respondents and the inspector of taxes, they have not received the purchase money, but only a part of it? They may find it convenient to deposit part of it with a building society as an inducement to the society to advance the whole of the purchase money to the purchaser; but the convenience of the respondents cannot prejudice the claim of the inspector.

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The proper course is to treat the purchase price as a receipt, and if the deposit is afterwards forfeited to take that loss into account in computing the profits of the year in which it occurs.

In re Harmony and Montague Tin and Copper Mining Co.; *Spargo's case* (1) was cited.

A. M. Latter K.C. and *F. Heyworth Talbot* for the respondents were not called upon.

The House took time for consideration.

Nov. 27. LORD THANKERTON (read by LORD ROCHE). My Lords, the question to be determined in this appeal arises in connection with the ascertainment of the balance of the profits and gains of the trade carried on by the respondents, assessable under Case I. of Sch. D of the Income Tax Act, 1918. The assessments here in dispute were for the years ending April 5, 1932, and April 5, 1933.

The respondents carry on business as speculative builders; they purchase areas of suitable land, make the roads and sewers, and erect small dwelling-houses, which they sell for about 500*l.* or 600*l.* to persons of small means, who are not usually able to provide from their own resources more than a very small part of the purchase price. The rest of the purchase money is advanced to the purchaser on mortgage by a building society under certain arrangements which give rise to the present question, and which are described in the case stated as follows:

" A building society will not in the ordinary way make an advance in excess of 75 per cent. of the value of the property mortgaged, and this was insufficient to enable the purchasers to pay the balance of the purchase money. In order that the advance by the building society to a purchaser might be for the full amount of the balance of the purchase money, an arrangement was entered into by the Company with the society under which the Company guaranteed to the society a proportion of the amount advanced. In addition to giving the guarantee the Company was required to make a deposit

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(1) (1873) L. R. 8 Ch. 407, 414.

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with the society of the whole or a part of the sum guaranteed, and on the amount of this deposit the society allowed the Company interest at the current rate payable by the society on ordinary deposits. The amount deposited with the society was usually one-third of the amount guaranteed. For example, on a house which was sold for 625*l.* the purchaser provided from his own pocket a sum of 35*l.* The society advanced 590*l.* to the purchaser and the Company gave a guarantee for 95*l.* as security for which it deposited the sum of 31*l.* 13*s.* 4*d.* with the society. The actual procedure on the completion of the sale was as follows: The representatives of the building society attended at the office of the Company's solicitors and handed to the solicitors a cheque or banker's draft for the net sum of 558*l.* 6*s.* 8*d.* as representing the difference between 590*l.*, the amount advanced to the purchaser, and 31*l.* 13*s.* 4*d.*, the amount of the Company's deposit with the building society. The solicitors thereupon paid over the cheque or draft for the net sum to the Company. All the arrangements with the society were made through the Company's solicitors."

In each case the Company and the society entered into an agreement providing for the guarantee by the Company of repayment by the purchaser of the advance by the society to him, the amount of the guarantee being limited, and further providing for a deposit by the Company with the society of an amount equal to the whole, or, as was usual, only a part of the amount guaranteed. Two specimen agreements are annexed to the case. It appears that the amount advanced to the purchaser on mortgage was usually repayable with interest in twenty years by equal monthly instalments.

The title of the purchaser was completed by a deed of transfer by the Company to him, in which the Company acknowledged receipt of the whole purchase-price. The case further states: "In the Company's trade account a deduction was made from the receipts from the sale of houses of the net amount deposited with the Society during the year under the guarantees, i.e., the sums deposited under the guarantees given during the year less any sums received back during the year on the release of guarantees. The interest received from the Society on the deposits is shown as a receipt in the profit and loss account, but the deposits are not shown as an asset in the Company's balance sheet."

The Crown maintains that the full amount of the purchase-money of the houses should be brought in as a trading receipt at the time of purchase, and that any subsequent losses under the guarantees should be allowed at the time when they occur.

The respondents maintained before the Special Commissioners and in the Courts below (1.) that the sums deposited by the Company with the building society ought not to be treated as receipts of the Company's trade at the time of purchase, but only when and in so far as such sums should subsequently be released to the Company by the society; or (2.) alternatively, that if the deposited sums are to be treated as receipts at the time of sale, they should be brought into account at figures not exceeding their actual "present values" as assets of the Company's trade. These were the main contentions of the respondents.

The Special Commissioners dismissed the respondents' appeal, their decision being as follows: "We held that the purchase price of each house was fully paid in cash at the time of each completed sale with a contingent liability on the Company in respect of its guarantee to the building society. The whole of the purchase money should therefore be brought in as a receipt of the Company's trade at the time of completion of the sale, and any loss under the contingent guarantee should be allowed at the time when the loss arose. If we were wrong in this view and a question of valuation arises, this was not, in our opinion after hearing the evidence, a case in which an actuarial valuation was possible, there being too many factors which are not capable of statistical evaluation. Further, we think that the fact that less interest is earned on the deposits than could be earned if the money were used in the Company's business would not affect the valuation."

The appeal by the present respondents to the King's Bench Division, on the case stated by the Special Commissioners, was dismissed by Finlay J., who affirmed the determination of the Special Commissioners, but both these decisions were reversed by the unanimous decision of the Court of Appeal, which held that the sums deposited with the building society should be brought in as trading receipts at the time of each sale, not at their face value, but on a proper valuation, and the case was remitted to the Commissioners for determination of such values and adjustment of the assessments.

The Crown now appeals from the order of the Court of Appeal, but the respondents have not appealed, and are therefore not in a position to maintain their first contention above referred to.

My Lords, I take it that in finding that the purchase price of each house "was fully paid in cash at the time of each completed sale," the Commissioners meant that the payment of the cheque or banker's draft for the whole amount advanced to the purchaser less the amount of the deposit was merely the shorthand way of giving a cheque for the whole advance in exchange for a cheque from the Company for the amount of the deposit. Taking the example given in the case stated, we are not told when, or by whom, the payment of the 35*l.* provided by the purchaser was made to the Company, but it is clear that as regards the balance of the price the building society acted as the agent of the purchaser. In my opinion, the whole arrangement was a tripartite one, which should not be separated up. It never was part of the arrangement that the Company was to be entitled to payment of the whole price at the time of sale, and that the Company was to hand over to the society the amount of the deposit. It is enough to say that the purchaser was never entitled to get the whole amount advanced paid over to him or paid over to the Company by the society as the purchaser's agents. It was clearly a condition of the advance to the purchaser by the society that the latter should retain the amount of the deposit. The acknowledgment of receipt of the whole price in the deed of transfer, which is conclusive in favour of a purchaser for value without notice, was necessary to give a good title, but cannot

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prevent the true facts being regarded in such a question as the present one.

I am therefore unable to agree with the view of the Commissioners and of Finlay J. that the whole of the purchase price should be brought into the account as a trading receipt at the time of sale.

In my opinion, it would be more correct to treat the retention of the deposit as a retention of part of the nominal purchase price with the consent of the Company, such sum to be applicable to reduction of the advance made by the society to the purchaser, in the event of the latter's default, any surplus going eventually to the Company. In other words, in the example referred to, the true purchase price was not 625*l.* but two sums of 35*l.* and 558*l.* 6*s.* 8*d.*, payable at the time of the sale, with a further addition of any balance eventually available from the deposit.

On the other hand, I am not prepared to say that the view taken by the Court of Appeal is not a legitimate one, though I should prefer my own view expressed above. The view of the Court of Appeal, as I understand it, is that, at the time of the sale, the Company received, in addition to the 35*l.* and the cheque for 558*l.* 6*s.* 8*d.*, an asset in the shape of a credit in the books of the building society, on which interest was payable to the Company, but which was subject to a contingent liability, which materially affected its value to the Company; that such asset should be valued as at the time of the completion of the sale, and that such value should be entered as part of the price received for the house. It is unnecessary to consider now whether such valuation will be subject to revision or readjustment on its eventual realization.

I am therefore of opinion that the case of the Crown has not been made out and that the Appeal fails, and, in the absence of a cross-appeal, the decision of the Court of Appeal will fall to be affirmed. But I have serious doubt as to whether the valuation ordered by the Court of Appeal is practicable in any proper sense; the Commissioners, after hearing evidence, have expressed the view that an actuarial valuation is not possible, and it may well be that no proper

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valuation is possible. I propose therefore that the order of the Court of Appeal should be varied by adding that in the event of the Commissioners finding such valuation to be impracticable, the sums deposited with the building society under the circumstances described in the case stated should not be treated as receipts of the Company's trade except in so far as such sums, or any part thereof, were released to the Company during the trading periods in question.

One other point should be mentioned. Counsel for the Crown drew your Lordships' attention to that part of the order of the Court of Appeal which ordered repayment by the Crown, pending determination of the matter, of the amount of income tax overpaid by the Company, on the basis that the deposits were of no value to them. The Crown has made the repayment, but counsel suggested that such an order was not within the capacity of the Court, in view of the provisions of s. 149, sub-s. 4, of the Income Tax Act of 1918. Counsel for the Crown did not press the point, but I desire to reserve any opinion on it.

I therefore propose that the Appeal should be dismissed with costs, and that the order of the Court of Appeal should be affirmed subject to the variation above suggested.

LORD ROCHE. My Lords, I am requested by my noble and learned friends Lord Atkin and Lord Macmillan to express their concurrence in the opinion which I have just read and with the reasons for arriving at the conclusion which is proposed. For myself I also desire to express my concurrence in the result and in the reasons.

LORD RUSSELL OF KILLOWEN. My Lords, I also concur.

Order appealed from varied by adding that in the event of the Commissioners for the Special Purposes of the Income Tax Acts finding an actuarial valuation impracticable, the sums deposited with the building society in the circumstances described in the Case should

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not be treated as receipts of the Company's trade except in so far as such sums or any part thereof were released to the Company during the trading periods in question, and that subject to such variation the said order be affirmed and the appeal dismissed with costs.

Lords' Journals, Nov. 27, 1936.

Solicitor for appellant: *The Solicitor of Inland Revenue.*
Solicitors for respondents: *Stooke-Vaughan & Taylor.*

[PRIVY COUNCIL.]

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VINCENT . . . . APPELLANT;

AND

TAURANGA ELECTRIC-POWER BOARD RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Limitation—Electric-Power Board—Claim by employee for damages for personal injuries—Based alternatively on breach of implied contract and breach of statutory duty—Action time-barred—Electric-Power Boards Act, No. 38 *of* 1925, *s.* 127*—Electric Supply Regulations,* 1927, *reg.* 178.

By s. 127 of the Electric-Power Boards Act, 1925: "(1.) No action shall be commenced against the Board or any member thereof, or other person acting under the authority, or in the execution or intended execution, or in pursuance of this Act for any alleged irregularity, or trespass, or nuisance, or negligence, or for any act or omission whatever, until the expiry of one month after notice in writing specifying the cause of action, ... has been given by the plaintiff to the defendant.

"(2.) Every such action shall be commenced within six months next after the cause of action first arose, whether the cause of action is continuing or not."

The appellant, who was employed by the respondents, a body corporate constituted under the provisions of the Electric-Power Boards Act, 1925, alleged that on June 6, 1930, while working on a transformer connected with high powered lines he met with an accident and sustained injuries. He issued a writ against the respondents on April 1, 1932, claiming general and special damages. On July 5, 1932, he delivered an amended statement of claim, basing his claim alternatively on (*a*) a breach of an implied term of his contract of employment, or (*b*) a breach of duty owed by the respondents to him as a workman in their employ.

Held, that the claim was out of time under s. 127 of the Act. The statutory words were characterized by the utmost amplitude, and the action was one against the respondents for something done or omitted to be done in the execution or intended execution of the Act within the meaning of s. 127. It mattered not whether the appellant's claim was regarded as based on implied contract or tort.

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* *Present:* LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ALNESS, SIR LYMAN POORE DUFF, and SIR GEORGE RICH.

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Order of the Court of Appeal of New Zealand [1933] N. Z. L. R. 902, affirmed.

APPEAL (No. 67 of 1935), by special leave, in forma pauperis, from an order of the Court of Appeal of New Zealand (July 21, 1933) dismissing an appeal by the present appellant, Frederick Charles Vincent, from an order of the Supreme Court of New Zealand (October 21, 1932) and allowing a cross-appeal by the present respondents, the Tauranga Electric-Power Board, from the order of the Supreme Court of New Zealand.

The appellant, who was employed by the respondents, alleged that on June 6, 1930, while working at Te Puke on a transformer connected with high powered lines, he met with an accident and sustained injuries. He issued a writ against the respondents on April 1, 1932, and his statement of claim as amended on July 5, 1932, claimed damages for (*a*) breach of an implied term of his contract of employment, or (*b*) breach of an absolute statutory duty owed to him by the respondents to comply with the provisions of reg. 178 of the Electric Supply Regulations, 1927. He alleged that in violation of reg. 178 he was not provided with the necessary safety apparatus, nor was the transformer, he said, in a safe condition or effectively rendered safe. Reg. 178 provides: "Where any high pressure or bare medium or low pressure conductor (except an earthed neutral or intermediate conductor) is in use no work shall be carried out on such conductor unless rubber gloves and safety belts, and insulated stand or rubber protective shields, or other means approved by the Chief Electrical Engineer of the Public Works Department are used to render such work on such conductor safe, or unless the conductor to be worked on and all other electric conductors within 3 ft. 6 ins. thereof are disconnected from the source of supply and earthed."

The respondents, a body corporate constituted under the provisions of the Electric-Power Boards Act, 1925, for the Tauranga District, pleaded that "this action has not been commenced within six months next after the cause of action (if any) first arose as required by s. 127 of the Electric-Power Boards Act, 1925."

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The only question for determination in this appeal was whether that section was applicable to the appellant's cause of action and was an effective bar to the proceedings.

The Supreme Court of New Zealand (Smith J.) held first that if the appellant could at the trial of the action show circumstances from which the contract alleged in the amended statement of claim was to be implied, s. 127 of the Electric-Power Boards Act, 1925, would not bar the action ; secondly, that if and in so far as the appellant's claim rested solely upon the respondents' omission to perform a statutory duty s. 127 was a bar to the action.

On an appeal by the appellant against the second of the above findings, and a cross-appeal by the respondents against the first finding, the Court of Appeal of New Zealand (Myers C.J., Herdman, MacGregor, Blair and Kennedy JJ.) dismissed the appellant's appeal and allowed the cross-appeal of the respondents. [During the hearing of the appeal it was admitted by counsel for the appellant that the real ground of complaint, common to both causes of action, was the breach of reg. 178 of the Electric Supply Regulations, 1927.] The appeal is reported at [1933] N. Z. L. R. 902.

1936. July 27. *W. N. Stable K.C.*, *John Buckley* and *John Platts Mills* for the appellant. If the limitation section applies it is conceded that the action was long out of time. The mistake which has been made in the Courts below arises not so much from misinterpretation of the section, but from the fact that they have attached a wholly undue importance to the fact that the standard of care required is defined and laid down by a statutory regulation. When the Legislature lays down the statutory regulation it is not creating the duty at all, the duty is to take reasonable care, the Legislature is merely defining or measuring it. The origin of s. 127 of the Electric-Power Boards Act, with the addition of a few words, is the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 51. There does not appear to be any decision which throws any light on the problem this case raises on this particular Act. All the authorities bearing on the matter are under the Public

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Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). [Reg. 178 of the Electric Supply Regulations, 1927, was read.] What is complained of is the breach of a private duty—the duty which the Board owes to their servant arising out of the contractual relationship of master and servant which was subsisting between them. The whole crux upon which this case turns is that the duty the Board owed to the appellant arose out of the individual contract that they had made with him. The authorities are directly in point, and lay down the test that the protection of this class of Act does not extend to anything which is done or omitted incidentally to the performance of the duty imposed but which is done by reason of some contract which it may or may not be the duty of the authority to make. That is the distinction. The acts which gave rise to the appellant's cause of action were not acts done under the authority or in the execution or intended execution or in pursuance of the Act, but at the most were acts done incidentally or indirectly in the execution of that Act. [Reference was made to *Bradford Corporation* v. *Myers.* (1)] On the question of statutory negligence see *Lochgelly Iron and Coal Co.* v. *M'Mullan* (2) and *Sharpington* v. *Fulham Guardians.* (3) The present case comes exactly within the principle in the *Fulham* case. (3) In this case the respondents, in the discharge of their statutory duty to supply electricity, entered into a private contract with the appellant, with the result that the section does not apply to that contract or to any claim that arises from any breach of the contractual relationship that was established by reason of the contract. The distinction here is that this particular duty was owed to him because he was employed to do the work in a situation of particular danger. It is not a duty which is owed to the public at large. Reg. 178 of the Electrical Supply Regulations, 1927, was created under powers conferred by a wholly different Act to the Electric-Power Boards Act, 1925—namely, the Public Works Act, 1908, and the Public Works Amendment Act, 1911. Once it is established that for the present purpose

(1) [1916] 1 A. C. 242, 251. (2) [1934] A. C. 1.
(3) [1904] 2 Ch. 449.

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the words of s. 127 of the Electric-Power Boards Act, 1925, and of s. 1 of the Public Authorities Protection Act, 1893, are sufficiently identical to make the English authorities apply, then this case is covered by the *Bradford Corporation* case. (1) [Reference was also made to *Edwards* v. *Vestry of St. Mary, Islington* (2); *Lyles* v. *Southend-on-Sea Corporation* (3); *Hayes* v. *King's Co. County Council* (4); and *Appelbe* v. *West Cork Board of Health.* (5)]

The limitation imposed by s. 127 of the Act is confined to acts arising in the execution by the respondents of the statutory functions it was created to perform, as, for example, the supply of electricity to the public: the section does not bar an action for damages for breach of a contract of employment made between a statutory body and one of its servants.

John Buckley followed.

Hon. S. O. Henn Collins K.C. and *Alexander Ross* for the respondents were not called upon.

Oct. 15. The judgment of their Lordships was delivered by

LORD ALNESS. This is an appeal by special leave, in forma pauperis, from an order of the Court of Appeal of New Zealand, dated July 21, 1933, dismissing an appeal by the present appellant from an order of the Supreme Court of New Zealand, and allowing a cross-appeal by the present respondents from the aforesaid order of the Supreme Court of New Zealand.

The sole question at issue before the Board is whether the appellant's right of action against the respondents is barred, as being out of time, by the terms of s. 127 of the Electric-Power Boards Act of 1925.

The relevant facts in the case are few in number, and are not in dispute. The appellant was a linesman in the employment of the respondents, who are a body corporate constituted under the provisions of the Electric-Power Boards Act, 1925, for the Tauranga District. The respondents (inter alia)

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(1) [1916] 1 A. C. 242.
(2) (1889) 22 Q. B. D. 338.
(3) [1905] 2 K. B. 1.
(4) [1917] 2 I. R. 496.
(5) [1929] I. R. 107.

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generated and supplied electric power to consumers of electricity within their area. The appellant alleges that, on June 6, 1930, while working, in the employment of the respondents at Te Puke, on a transformer connected with highly powered lines, he met with an accident, and sustained severe burning and other injuries.

On April 1, 1932—i.e., admittedly more than six months after the cause of action first arose—the appellant issued a writ against the respondents in the Supreme Court of New Zealand, claiming general and special damages resulting from his injuries. On July 5, 1932, the appellant delivered an amended statement of claim. His claim was based alternatively (*a*) on a breach of an implied term of his contract of employment with the respondents, or (*b*) on a breach of duty owed by the respondents to the appellant as a workman in their employ. The respondents, on August 30, 1932, delivered their statement of defence, pleading (inter alia) that the action, having regard to the terms of s. 127 of the Electric-Power Boards Act, 1925, was time barred.

It may be convenient at this point to set out the precise terms of s. 127. They are as follow :—

" (1.) No action shall be commenced against the Board or any member thereof, or other person acting under the authority, or in the execution or intended execution, or in pursuance of this Act, for any alleged irregularity, or trespass, or nuisance, or negligence, or for any act or omission whatever, until the expiry of one month after notice in writing specifying the cause of action, the Court in which the action is intended to be commenced, and the name and residence of the plaintiff and of his solicitor or agent in the matter has been given by the plaintiff to the defendant.

" (2.) Every such action shall be commenced within six months next after the cause of action first arose, whether the cause of action is continuing or not."

On July 8, 1932, it was ordered by the Court, by consent, that the question of law—namely : " Whether s. 127 of the Electric-Power Boards Act, 1925, is applicable to the plaintiff's cause of action, and an effective bar to the proceedings instituted by him "—should be argued before the trial of the action, the action being meanwhile adjourned. In short, the defence tendered by the respondents was treated by the Court as a demurrer point. On September 27, 1932, the question of law referred to was argued before Smith J., and on October 21, 1932, the learned judge found: (1.) that, if the appellant could, at the trial of the action, show circumstances from which the contract alleged in the amended statement of claim was to be implied, s. 127 of the Electric-Power Boards Act, 1925, would not bar the action; and (2.) that, if and in so far as the appellant's claim rested solely upon the respondents' omission to perform a statutory duty, s. 127 was a bar to the action.

The appellant appealed against finding (2.), and the respondents cross-appealed against finding (1.). On July 21, 1933, the appeal and the cross-appeal were heard by the Court of Appeal of New Zealand, when it was ordered by the Court that the appeal be dismissed, and that the cross-appeal be allowed. From that order, special leave to appeal in forma pauperis having been granted by an Order in Council, the present appeal has been taken.

The decision of the appeal must, in their Lordships' opinion, turn upon the proper construction to be attached to s. 127 of the Act of 1925, and its application to the facts of the case. Mr. Stable, in the course of a forceful and ingenious argument, invoked the assistance which he conceived that he obtained from certain decisions pronounced in England under an analogous statute—namely, the Public Authorities Protection Act, 1893. In their Lordships' judgment, these decisions, to say the least of it, fall to be handled with care, inasmuch as the wording of the two statutes differs in material particulars. Their Lordships think that they must steadily bear in mind the terms of s. 127 of the New Zealand statute.

The form of that section is somewhat peculiar, and it will repay analysis. The section falls into two parts. The first sub-section is negative, and forbids an action of the character there described, unless the plaintiff has complied with certain conditions precedent. These are that written notice be given by the plaintiff to the defendants, a month before the raising of the action, of (*a*) the cause of action, (*b*) the Court in which it is to be commenced, and (*c*) the name and residence of the plaintiff and of his solicitor or agent. The second sub-section is positive, and provides that every action described in sub-s. 1 shall be commenced within six months after the cause of action first arose.

Now, their Lordships cannot doubt that this is an action against the Board for something done or omitted to be done in the execution or intended execution of the Act. The statutory words are characterized by the utmost amplitude, and they seem to their Lordships to leave the appellant no loophole of escape. It matters not whether one regards the appellant's claim as based on implied contract or on tort. The nomenclature employed appears to their Lordships, in the circumstances, to be immaterial. The appellant, in his amended statement of claim, has chosen to christen his first cause of action as implied contract, and his second as tort: but both sound in breach of reg. 178 of the Electrical Supply Regulations, 1927. In any event, the first alternative appears to their Lordships to be difficult to maintain. Mr. Stable was constrained to admit that he was unaware of any precedent for so basing such a claim as this, and he also admitted, that, if his argument was sound, the doctrine of implied contract might, with equal force, have been invoked, and successfully invoked, in any action of damages by a workman against his employer, for breach of the Factory Acts. If Mr. Stable is right, then the supineness of learned counsel in failing sooner to discover and apply this sovereign remedy against time limitation is, to say the least of it, remarkable.

On analysis, the implied contract on which the appellant founds is revealed as being one of peculiar character. It is a contract on the part of the employer, as was pointed out in the course of the argument, to observe the requirements of reg. 178—in other words, to obey the law. But the employer has no option to do otherwise. Moreover, if Mr. Stable is right, then, as he admitted, not only is any employee of the Electric-Power Board unaffected by the statutory time limit,

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but, wherever the relation of master and servant exists, that limit does not apply. This, it seems to their Lordships, is a reductio ad absurdum of the argument under consideration.

Mr. Stable demurred to the importance attached by the Court of Appeal to an alleged admission made by counsel in the course of the hearing before them. Their Lordships do not propose to proceed either upon that admission, or upon the English decisions cited by Mr. Stable. While not desiring to cast the slightest doubt upon the soundness of these decisions, their Lordships, placing the terms of s. 127 of the New Zealand Act *vis-à-vis* of the proceedings in this case, cannot resist the conclusion that the appellant's claim is out of time. They will therefore humbly advise His Majesty that the appeal should be dismissed, and that the judgment of the Court of Appeal of New Zealand should be affirmed.

Solicitors for appellant: *T. E. Crocker & Son.*
Solicitors for respondents: *Wray, Smith & Halford.*

[PRIVY COUNCIL.]

JAMES JACKSON (SUBSTITUTED FOR CHIEF KWAMINA SAKYIAMA, DECEASED) . . . . APPELLANT;

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Oct. 29.

AND

J. M. COOKE . . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Gold Coast—Jurisdiction—Proposed acquisition of land for public service—Notice—Questions of disputed title—Compensation—To be determined by Divisional Court—Proceedings in Native Tribunal misconceived—Public Lands Ordinance, No. 8 *of* 1876 *—Public Lands Ordinance, c.* 142 *of the Laws of the Gold Coast Colony, ss.* 6, 7*—Public Lands Amendment Ordinance, No.* 17 *of* 1929, *s.* 2.

After notice has been given under the Public Lands Ordinance (c. 142 of the Laws of the Gold Coast Colony) by the Colonial Secretary of the Colony of the proposed acquisition of lands for the public service the Divisional Court of the Gold Coast is, under the Ordinance, and particularly ss. 6 and 7 thereof, the proper tribunal to determine the amount of compensation due in respect of the lands, and also any case of disputed interest in or title to the lands.

Where, therefore, an action had been begun in the Native Tribunal of Cape Coast involving a claim to land which was the subject of a notice issued by the Colonial Secretary of the Colony, and proceedings under the Lands Ordinance, in which the defendant in the action before the Native Tribunal was a party, were pending in the Divisional Court, the proceedings before the Native Tribunal were misconceived and should have been stayed.

Decision of the West African Court of Appeal affirmed.

APPEAL (No. 23 of 1934) from the decision of the West African Court of Appeal (May 9, 1933) ruling that the action, which had been commenced in the Native Tribunal of Cape Coast, was not properly before such Tribunal, and that its judgment and all subsequent proceedings amounted to a nullity, but awarding the respondent (defendant) costs on appeal and in the Courts below.

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* *Present:* LORD MAUGHAM, LORD SALVESEN, and SIR LANCELOT SANDERSON.

On January 30, 1931, proceedings were begun in the Native Tribunal of Cape Coast in which the present appellant, as plaintiff, called upon the respondent (defendant) " to establish his claim " to the land in suit. It subsequently transpired during the hearing of the appeal by the West African Court of Appeal from the judgment of the Provincial Commissioner, who had reversed the decision of the Native Tribunal given in favour of the plaintiff, that in 1926 the Colonial Secretary of the Colony had issued a notice under the Public Lands Ordinance, 1876 (now c. 142 of the Laws of the Gold Coast Colony) to the effect that the land, the subject of the action, was required for the use of the public service: it further transpired that the defendant in the action before the Native Tribunal was a claimant to the identical land in proceedings which were then pending in the Divisional Court under the Public Lands Ordinance.

The main question in this appeal was whether the ruling of the West African Court of Appeal (Michelin A.C.J. (Gold Coast), Kingdon C.J. (Nigeria), and Webber J.) that under the provisions of s. 7 of the Public Lands Ordinance (c. 142 of the Laws of the Gold Coast Colony) as amended by s. 2 of Ordinance No. 17 of 1929, the action " could not be instituted until after the proceedings before the Divisional Court had been terminated " was correct. The West African Court of Appeal held that the action was " not properly before the Native Tribunal and any judgment upon such an action was a nullity and all subsequent proceedings thereon amounted to a nullity." They awarded the respondent (defendant) his costs on appeal and in the Courts below.

By the Public Lands Ordinance, c. 142, s. 6, as amended by s. 2 of No. 17 of 1929, " If for three months after the service and publication as aforesaid of such notice, no claim shall be lodged with the Colonial Secretary, in respect of such lands, or if the party who may have lodged any claim, and the Colonial Secretary shall not agree as to the amount of the compensation to be paid for the interest in such lands or of the buildings thereon belonging to such party, or if such party has not given satisfactory evidence of his alleged interest, or if separate and conflicting claims are made in respect of the same lands, the amount of compensation due, (if any), and every such case of disputed interest or title, shall be settled in accordance with the following provisions :—

(I.) Any of His Majesty's Courts having jurisdiction to determine as to the ownership of such lands shall have jurisdiction to hear and determine in all such cases as aforesaid. . . . ."

Sect. 7 of the Public Lands Ordinance, c. 142, as amended by s. 2 of Ordinance No. 17 of 1929, provides that : "The decision of the Court respecting compensation, or in case of disputed interest or title as aforesaid or of the Appeal Court, where appeal has been taken, shall be final and conclusive as respects all persons whatsoever, and where any compensation has been awarded it may be paid over to the person who shall appear by the judgment of the Court or of the Appeal Court where appeal has been taken to have the best right thereto, and such payment shall, as concerns the Colonial Secretary, operate as a complete discharge and acquittance of such compensation and of all claims in respect of such lands or any interest therein, but shall not hinder any subsequent proceedings at the instance of any person having or alleging better right thereto as against the person to whom such payment may have been made."

Oct. 23. *Sir W. Brandford Griffith* for the appellant. James Jackson is the occupant of the family stool [the Anona Stool], and his claim was for "the defendant to establish his claim" to the land in question. After counsel for the appellant had addressed the West African Court of Appeal and whilst counsel for the respondent was in the midst of his speech it transpired that before the issue of the writ of summons in the Native Tribunal notice had been issued by the Colonial Secretary that the land was required for the public service : it was also stated that proceedings, to which the defendant

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was a party, were pending in the Divisional Court. In the ruling of the Appeal Court [set out in the judgment of the Judicial Committee] the judges must have meant s. 6 and not s. 7—there are no proceedings under s. 7, there are under s. 6. The Court's order does not say that the Court's ruling was by consent. They did not give their ruling upon the admissions of counsel; they gave their judgment on the fact that proceedings were still pending in the Divisional Court, and it was thus clear that they gave a ruling on the construction of the Ordinance. It was not a judgment by consent. The admissions and the finding of the Court of Appeal were erroneous.

Secondly, until the Colonial Secretary had obtained a certificate of title under s. 9 of the Ordinance title was vested in the original owner, so that a person who claimed to be owner could bring actions in a Native Tribunal to assert his rights with respect to the land.

There was an application to the Court of Appeal for review, but only as to costs. The practice of the Court should have been followed and, the matter having been raised for the first time in the Court of Appeal, costs should not have been allowed. The judgment appealed from should in any event be amended with regard to costs: on the question of costs reference was made to *Ewua* v. *Wusu* (1); *Renner* v. *Thensu* (2); and *Narh Skipo* v. *Lassinueh.* (3) The action in the Native Tribunal could be instituted notwithstanding that the proceedings in the Divisional Court under the Public Lands Ordinance had not terminated. The action was properly instituted before the Native Tribunal which heard it.

The respondent did not appear and was not represented.

Oct. 26. The judgment of their Lordships was delivered by

Lord Maugham. This is an appeal from the decision of the West African Court of Appeal, pronounced on May 9, 1933, deciding that the action, which had been commenced

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(1) (1926) Gold Coast L. R. Full Court, 1926–29, 160, 161.

(2) (1929) Ibid. 498, 500.

(3) Gold Coast Full Court Rep. 1922, 29.

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in a Native Tribunal, was not properly before such tribunal, and that its judgment and all subsequent proceedings amounted to a nullity, but awarding the respondent costs on appeal and in the Courts below. The proceedings were begun by writ of summons, dated January 30, 1931, in the Native Tribunal of Cape Coast by the appellant, as plaintiff, against the respondent, as defendant, and according to the appellant the substantial question was whether the land, the subject of such action, was the property of the family of the plaintiff or the family of the defendant. The writ, however, called upon the defendant to establish his claim to the land.

The Native Tribunal having given judgment on October 31, 1931, in favour of the appellant (plaintiff) with costs, the respondent (defendant) appealed to the Provincial Commissioner's Court of the Central Province. The Provincial Commissioner, on August 22, 1932, gave judgment, reversing the decision of the Native Tribunal, in favour of the respondent with costs. From the judgment of the Provincial Commissioner's Court the appellant appealed to the West African Court of Appeal, and the appeal came up for hearing before that Court on May 4, 1933.

On May 9, 1933, after counsel for the appellant had addressed the Court at length, it transpired that in 1926 the Colonial Secretary of the Colony had issued a notice under the Public Lands Ordinance, 1876 (now c. 142 of the Laws of the Gold Coast Colony) to the effect that the land, the subject of the action, was required for the use of the public service. What happened then is shown by the following note of the President of the Court :—

" Both counsel agree that when this suit was instituted, proceedings under the Lands Ordinance in which the defendant Cooke was a claimant, were pending in the Divisional Court at Cape Coast, and had not yet been determined, and are not yet determined.

Both counsel agree that under s. 7 of the Public Lands Ordinance, writ of summons could not have been instituted in the Native Tribunal until the proceedings under the Public Lands Ordinance had been terminated.

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The Court adjourns for ten minutes.

On resumption, the Court delivers the following ruling :—

By The Court.

Counsel for each side having admitted to the Court that at the time when the writ of summons in respect of which this appeal has been taken, was instituted in the Native Tribunal, proceedings were then pending in the Divisional Court of Cape Coast under s. 7 of the Public Lands Ordinance (c. 142) as amended by s. 2 of Ordinance 17 of 1929 in which the present defendant was a claimant to the identical land described in the writ of summons, it is clear that under the provisions of the latter section, such an action could not be instituted until after the proceedings before the Divisional Court had been terminated.

The action was therefore not properly before the Native Tribunal and any judgment upon such an action was a nullity and all the subsequent proceedings thereon amounted to a nullity.

We consider that the respondent (Cooke) should have his costs, not only in this Court, but in the Courts below.

The costs in this Court are assessed at the sum of 33*l.* 8*s.* 6*d.*

The Court below to carry out."

From this decision the appellant has brought the present appeal. He has appeared by counsel to argue that notwithstanding the agreement by his counsel before the Court of Appeal that under s. 7 of the Public Lands Ordinance the action could not properly have been instituted in the Native Tribunal until the proceedings under the Public Lands Ordinance had been terminated, it was open to him to contend that both the admission and the finding by the Court of Appeal were erroneous and that the appeal should have been decided on the merits. The respondent did not appear on this appeal and their Lordships have not had the advantage of hearing an argument on his behalf.

Their Lordships were not of opinion that the judgment appealed from could be regarded in strictness as a consent judgment. The decision on the construction of the Ordinance appears to be one for which the Court took at least some responsibility, and this is not the less true because the admission of counsel for the appellant seemed to justify the view expressed by the Court. In these circumstances it seemed to their Lordships desirable to hear the question of construction argued by counsel for the appellant.

At the close of this argument it seemed clear to their Lordships on a consideration of the Ordinance as a whole and in particular of ss. 6 and 7 that, after notice had been given by the Colonial Secretary of the proposed acquisition of the lands in question as lands required for the service of the Colony, the Divisional Court of the Gold Coast was the proper tribunal to determine the amount of compensation due in respect of the lands, and also any case of disputed interest in or title to the lands. Under s. 7 this determination (subject to appeal) is to be final and conclusive as respects all persons upon whom notices have been served, or who have appeared and claimed. Payment of the compensation to the person appearing by the judgment of the Court to have the best right thereto is a complete discharge to the Colonial Secretary, " but shall not hinder any subsequent proceedings at the instance of any person having or alleging better right thereto as against the person to whom such payment may have been made." It is possible that these sections do not take away the right of the proper Native Tribunal to determine some temporary question of possession or receipt of rent, or the like, arising prior to the conveyance to the Colonial Secretary; but in the present case it is to be noted that the writ of summons sought to establish the title of the Anona family to the land and that although the endorsement on the writ itself stated that the defendant was " involved in litigation in the Divisional Court, Cape Coast, with the intent of alienating the said land to himself and the family he claims to represent, and of divesting the said Anona family and their Stool of their rights in the said land." In their Lordships' view this question was within the jurisdiction of the Divisional Court by the express language of the Ordinance. To the knowledge of the appellant there was a proceeding pending before that Court relating to the

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matter. If the appellant for some reason was too late to make a claim before that Court he would still, under the words quoted, be entitled to make a claim against the person to whom the payment of the compensation may have been made. In these circumstances, their Lordships think that the proceedings before the Native Tribunal were misconceived and could have served no useful purpose. It does not seem to their Lordships necessary to determine whether the Native Tribunal was entirely divested of jurisdiction in the matter by the proceedings in the Divisional Court, since on any view the proceedings in the Native Tribunal should have been stayed and the judgment of that tribunal, if not a nullity, must have been set aside. Their Lordships do not think they are called upon in the present case to consider the precise form of the judgment under appeal since they are satisfied that in substance it is correct.

As regards the costs awarded to the respondent by the judgment, it seems to their Lordships sufficient to say that the costs were in the discretion of the Court of Appeal and their Lordships do not consider that there is any special circumstance here which would justify an appeal to His Majesty in Council in respect of costs alone.

Their Lordships have therefore humbly advised His Majesty that this appeal should be dismissed.

Solicitors for the appellant: *A. L. Bryden & Co.*

[PRIVY COUNCIL.]

ALLEN AND OTHERS . . . . APPELLANTS ; J. C.*

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F. O'HEARN AND COMPANY . . . RESPONDENTS. Oct. 29.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO.

Canada—Ontario—Broker—Business conducted through firm with seat on Exchange—Margin account—Securities sold to meet insufficient margin—Property of undisclosed principals—Broker's right of action against firm—Not as trustee for principals.

C., an outside broker, who conducted his brokerage business through the defendants, who had a seat on the Toronto Standard Stock and Mining Exchange, gave instructions for the purchase and sale of shares without disclosing the name of his clients. Most of the transactions were on margin. C. found himself unable to find the cash for large purchases of a certain class of stock then open, and could not find the client for whom the purchases had been made. The defendants, purporting to act under powers given by the contract between them and C., proceeded to sell shares bought and held as security on the general account, which mainly consisted of shares bought on behalf of C.'s clients, and in that way indemnified themselves against the loss on the particular stock in question. C. went into bankruptcy, making an assignment for the benefit of his creditors. On a claim for damages by C. and his trustee in bankruptcy against the defendants, the trial judge made a declaration (inter alia) that the defendants held the securities which they sold in trust for C. or his trustee in bankruptcy as trustee for C.'s customers and clients, and that the defendants had no right to charge those securities with the purchase price of the stock, and the judgment made provision for the determination and payment of damages. On appeal by the defendants the Court of Appeal of Ontario set aside this judgment. The plaintiffs appealed :—

Held, that that judgment of the trial judge could not stand. So far as the rights of the parties depended upon contract, C. had no claim against the defendants in the capacity of trustee. Although there had been numerous actions in which an agent for undisclosed principals had sued in his own name, there appeared to be no precedent for such an agent suing as trustee for his principals.

Held, further, that if the case were regarded as a wrongful dealing with property apart from privity of contract the result was the same. If there was nothing due from the undisclosed principal in respect of the shares which had been bought, either he or the agent must sue : no question of trusteeship arose.

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* *Present :* LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ALNESS, and SIR LYMAN POORE DUFF.

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With regard to shares deposited as margin, the agent was in the position of mortgagee with a right to submortgage. A mortgagee was not a trustee, and if the shares were improperly dealt with by the submortgagee, the mortgagee could sue in his own right, or the mortgagor might, under proper conditions, sue to protect his property. The mortgagee could not sue as trustee for the mortgagor, for he was not a trustee. In the present case either C.'s rights passed to his trustee in bankruptcy, or C.'s customers alone could sue, and neither C. nor his trustee could sue as trustee for the customers.

Judgment of the Court of Appeal of Ontario, setting aside the judgment of the trial judge, affirmed.

APPEAL (No. 5 of 1936) from a judgment of the Court of Appeal of Ontario (April 16, 1935) reversing a judgment of Kingstone J. (December 1, 1934).

The appellant L. S. Clarke (since deceased and now represented by his executors) began a general brokerage business in January, 1931, and not having a seat on any stock exchange entered into arrangements with the respondents, F. O'Hearn & Co., who carried on a stock and grain brokerage business in Toronto with a seat on the Toronto Standard Stock and Mining Exchange and other Exchanges, to conduct his brokerage business through them. When orders were given to the respondents the names of Clarke's customers were never disclosed. Most of the transactions were on margin, and the terms of the contract note gave the respondents the right to pledge or sell securities carried by the respondents for the account of L. S. Clarke in case the margin became insufficient.

In 1932, L. J. Bayne, the manager of Clarke's North Bay branch, gave a series of orders to the respondents for the purchase of a large number of Peninsular Petroleum Company's shares (Pen. Petes.). Eventually Clarke could not find the cash for the purchases then open, or the client for whom the purchases were made. The respondents, purporting to act under the powers given them by the contract between them and Clarke, sold shares bought and held as security on the general account which mainly consisted of shares bought on behalf of Clarke's clients, and so indemnified themselves against the loss on the Pen. Petes.

Clarke went into bankruptcy, making an assignment for the benefit of his creditors, and the appellant J. A. Allen became the assignee in bankruptcy. Clarke and Allen brought the present action against the respondents claiming (inter alia) damages for wrongful sale of the securities. The question in this appeal was whether the judgment of the trial judge (Kingstone J.), which the appellants contended gave them the relief they were entitled to, and of which they asked no variation, could be supported. That judgment declared that the respondents held the securities in the account of L. S. Clarke, and sold by them, in trust for L. S. Clarke as trustee, or J. A. Allen as trustee for the clients and customers of L. S. Clarke, and that the defendants had no right to charge the securities with the purchase price of the Pen. Pete. shares, and that the plaintiffs as joint trustees for those clients and customers were entitled to damages for the wrongful sale and disposal of the securities belonging to the customers and clients.

The Court of Appeal of Ontario (Riddell, Fisher and Macdonnell JJ.A.) allowed an appeal by the respondents and dismissed the action.

1936. July 21, 23. *J. C. McRuer K.C.* and *J. H. McDonald K.C.* for the appellants.

After counsel had opened the facts, and during the course of his argument, Lord Russell of Killowen said: You have to satisfy the Board that the plaintiffs have the right to sue the respondents to establish the rights of other persons.

McRuer K.C. There was an arrangement for this business to be carried on in this particular way: Clarke took the orders, the shares were put into his hands for a particular purpose, and he was therefore a trustee of those shares. It is a well-established principle that a broker who holds securities purchased on margin holds them as trustee—there is a fiduciary relationship created. [Reference was made to *The Winkfield.* (1)]

W. N. Tilley K.C. for the respondents was not called upon.

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(1) [1902] P. 42.

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July 23. LORD ATKIN. Their Lordships have come to the conclusion that, in view of the form of the judgment of the trial judge, the action must fail.

Oct. 29. The reasons for the decision of their Lordships were delivered by LORD ATKIN. This is an appeal from the Court of Appeal of Ontario, who reversed a decision of Kingstone J. in favour of the plaintiffs and dismissed the action with costs. The original plaintiffs were L. S. Clarke and J. A. Allen, his trustee in bankruptcy. During the proceedings Mr. Clarke died and his executors were added as parties. The defendants are brokers in Toronto and have a seat on the Standard Stock and Mining Exchange in Toronto and upon other exchanges. Mr. Clarke was a civil engineer and engaged in a prosperous lumbering business in Ontario. About 1931 he was induced by a Mr. Bayne to embark in a brokerage business at North Bay which had just closed down, in which Mr. Bayne had been concerned. He started the business and opened two branches, one at North Bay managed by Mr. Bayne, and another at Sudbury. He was introduced by Mr. Bayne to the defendant firm, and his brokerage business in stocks and shares was conducted through the defendants, a firm of good standing and experience. Mr. Clarke's country clients gave orders to Mr. Clarke for the purchase and sale of shares. Mr. Clarke would give the necessary instructions to the defendants in his own name, not disclosing the name of his client. The defendants would render a broker's contract note to Clarke, and he would render a similar note in his name to his client. Most of the transactions were on margin: and there were terms in the contract notes regulating the rights of the parties and the power of the respective brokers to realise the shares bought and the securities held as margin in case the margin became insufficient. These terms were an important part of the original case for both plaintiffs and defendants, but, in their Lordships' view, are now irrelevant. Business proceeded on normal lines for some months until, in September, 1932, Bayne, acting in conjunction with one Barkell, began a series of transactions in a company called Peninsular Petroleum, Ld. (Pen. Petes.), out of which arose the trouble which brought Mr. Clarke to ruin. A series of orders were given to the defendants for the purchase of large numbers of these shares. They were low-priced shares which, under the rules of the relevant stock exchange, could not be dealt with on margin. Eventually Clarke found himself unable to find the cash for the purchases then open: nor could he find the client for whom the purchases should have been made. Apart from these purchases the account as between Clarke and his clients and Clarke and the defendants was apparently in order with sufficient margin. The defendants, purporting to act under powers given them by the contract between them and Clarke, proceeded to sell shares bought and held as security on the general account, which mainly consisted of shares bought on behalf of Clarke's clients, and in this way indemnified themselves against the loss on Pen. Petes. Clarke went into bankruptcy, making an assignment for the benefit of his creditors on February 28, 1933, of which the other plaintiff is trustee. The present action was commenced by writ dated September 27, 1933. The amended statement of claim was delivered on January 24, 1934. It is unnecessary to discuss the various forms of relief claimed in this document, for this case has to be decided upon the relief given by the learned judge at the trial which the plaintiffs, the appellants before this Board, contended was the relief they were entitled to, and of which they asked no variation.

The learned judge came to the conclusion that the defendants were not entitled to make the sales complained of, and by his formal judgment dated December 1, 1934, made the following declarations and orders:—

"2.—This Court doth declare that the defendants held the securities in the account of the plaintiff L. S. Clarke and sold by the defendants on or after the 7th day of February, 1933, in trust for the plaintiff L. S. Clarke as trustee or the plaintiff J. A. Allen as trustee, for the clients and customers of the plaintiff L. S. Clarke, and that the defendants had no right to charge the said securities with the purchase price of 300,000 shares of Peninsular Petroleum stock referred to in the plaintiffs' statement of claim herein, and the plaintiffs as joint trustees for these customers and clients are entitled to damages for the wrongful sale and disposal of the securities belonging to the said customers and clients and sold by the defendants on or after the 7th day of February, 1933, and doth adjudge the same accordingly.

3.—This Court doth order and adjudge that this cause be referred to the Local Master at North Bay to determine the amount of damages, if any, that the defendants ought to pay for the said wrongful sale and disposal of the same, and who are the customers and clients so entitled, and the amount due to each of such clients and customers for damages accordingly.

4.—This Court doth further direct that the defendants do pay to the plaintiffs the amount when so ascertained, and that the same constitute a special trust fund to be distributed among the parties entitled as the customers and clients of L. S. Clarke for whom the said securities were sold, and doth adjudge the same accordingly."

Their Lordships are of opinion that this judgment cannot stand. So far as the rights of the parties depend upon contract either Clarke's customers were undisclosed principals of Clarke in relation to the defendants, and had the contractual rights of such principals, or they were not. If they were they had the right of suit for breaches of contract, or alternatively until they exercised their rights Clarke could sue: but these are ordinary legal rights. The supposed agent's rights would be to recover the damage suffered by him on the footing that he had been principal. He has no claim against the other party in the capacity of trustee: and though there have been countless actions in which an agent for undisclosed principals has sued in his own name, there appears to be no precedent for such an agent suing as trustee for his principals. What happens to the proceeds of a successful claim by such an agent is another matter. By virtue of his fiduciary relation to his principals he may have to account to them for what he receives: but this is not the concern of the other party.

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If the case is looked at as a wrongful dealing with property apart from privity of contract the result is the same. As far as the shares agreed to be bought are concerned, if there is nothing due from the undisclosed principal either he or the agent must sue. No question of trusteeship arises. As far as the shares deposited as margin are concerned, the agent is in the position of mortgagee with a right to submortgage: a mortgagee is not a trustee: and if the shares are improperly dealt with by the submortgagee, the mortgagee can sue in his own right, or the mortgagor may under proper conditions sue to protect his property: but the mortgagee cannot sue as trustee for the mortgagor for he is not trustee. In the case in question either Clarke's rights passed to the trustee or Clarke's customers alone could sue. Neither Clarke nor the trustee could sue as trustee for the customers: and clearly they were not joint trustees as they have been declared to be by the judgment. It appears to their Lordships, therefore, that the judgment was properly set aside by the Court of Appeal, and as no other relief was asked for by the plaintiffs the action was properly dismissed. The decision of the Court of Appeal appears to have been based principally on consideration of the question whether the customers could be considered as undisclosed principals of Clarke so as to affect the defendants' dealings with the shares in question. On this matter their Lordships have not thought it necessary to express an opinion: and the opinions of the learned members of the Court of Appeal upon this question and on the construction of the contractual documents must not be treated as forming any part of the grounds of the present decision. Fisher J.A., in addition to other grounds, clearly indicated the view that has been maintained in the foregoing reasons. Their Lordships are of opinion that this appeal fails, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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CHANDRASEKERA ALIAS ALISANDIRI . APPELLANT;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

Ceylon—Criminal Law—Murder—Evidence—Throat injury—Victim unable to speak—Fully conscious—Signs—Nod in answer to direct question—" Verbal " statement—Admissibility—Ceylon Evidence Ordinance, No. 14 *of* 1895, *s.* 32.

A woman whose throat had been cut was unable to speak owing to the nature of the wound. She was fully conscious, however, and able to understand what was said to her, to make signs and to nod her head slightly. After making certain signs which, it was alleged, possibly indicated the appellant, she was asked the direct question whether it was the appellant who had cut her throat, and in answer to that question she nodded her head. She died shortly afterwards from asphyxia resulting from the injury to her throat.

Held, first, that evidence as to signs made in answer to questions put to the deceased was admissible, but that statements of witnesses as to what interpretation they put upon the signs were not admissible.

Queen-Empress v. *Abdullah* (1885) I. L. R. 7 A. 385, approved and applied.

Held, further, that the direct question to the deceased whether it was the appellant and her nod of assent constituted a verbal statement made by her within the meaning of s. 32 of the Ceylon Evidence Ordinance, 1895, and as such was admissible in evidence under the section. There was proper and sufficient evidence of a verbal statement by the deceased to the effect that it was the appellant who had cut her throat.

Judgment of the Supreme Court of the Island of Ceylon affirmed.

APPEAL (No. 30 of 1936), by special leave, from a judgment of the Supreme Court of the Island of Ceylon (May 1, 1935) whereby the appellant, Alexander Perera Chandrasekera alias Alisandiri, was convicted of the murder on May 15, 1934, of a woman named Salami Nadatchi and sentenced to death.

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* *Present:* LORD ROCHE, SIR JOHN WALLIS, and SIR GEORGE RANKIN.

The appellant was indicted at a Session of the Supreme Court in its criminal jurisdiction for the Western Circuit at Colombo before a Commissioner and a jury of seven persons. He was found guilty by a majority of six to one.

The deceased, a widow of about forty-two years of age, was found with her throat cut. The injuries were so severe and of such a nature that she was unable to speak. She was fully conscious,however, and able to understand what was said to her. It was alleged that she made signs which possibly indicated the appellant as the man who had attacked her, and that in response to a direct question whether it was the appellant she nodded her head. There was no other evidence as to how she came by her injuries sufficient to warrant a conviction, and the main question raised in this appeal was whether information given by signs made in answer to questions put to the deceased shortly before her death was a statement within the meaning of s. 32 of the Ceylon Evidence Ordinance, No. 14 of 1895, and as such admissible in evidence by virtue of that section.

The facts and the relevant provisions of the section appear from the judgment of the Judicial Committee.

The trial judge (Mr. Commissioner F. J. Soertsz K.C.) ruled on the authority of *Queen-Empress* v. *Abdullah* (1) that evidence as to the signs made in answer to questions put to the deceased woman was admissible, but that the statements of witnesses as to what interpretation they put upon such signs were not admissible. He further held that it was for the jury to decide what inference, if any, they should draw from the questions put and the signs made in response.

1936. Nov. 10, 12. *L. M. D. de Silva* (K.C. Ceylon) for the appellant. The admission in evidence of the statements of deceased persons under the law of Ceylon and the admission of

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(1) (1885) I. L. R. 7 A. 385.

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dying declarations under the law of England are both exceptions to the rule against hearsay. The admission must be confined to the narrow limits within which it is permissible to utilize such evidence. As to the danger of admitting dying declarations and the caution to be exercised in admitting them, see Taylor on Evidence, 12th ed., vol. i, arts. 716 and 722 [the articles were read and the cases there cited referred to]. The dangers inherent in hearsay, such as inaccuracy and incompleteness, are greater in the case of statements alleged to be made by signs than they are in the case of statements made in words. It has to be remembered that the test of cross-examination is not available with regard to the statements of deceased persons.

The law of Ceylon relating to the statements of deceased persons is to be found in s. 32 of the Evidence Ordinance, No. 14 of 1895, which is identical with s. 32 of the Indian Evidence Act, No. I. of 1872. The words " written or verbal" will not cover a statement made by signs. It may be possible to argue that all words are signs, but it cannot be argued that all signs are words. " Signs " were present in the mind of the Legislature, because the word is used in s. 119, which deals with the evidence of a dumb witness. In such a case signs made in Court only are admissible. The omission of signs in s. 32 is therefore deliberate. It has been omitted because signs are much more likely to be indefinite than words. Evidence given by signs is inferior in quality to evidence given by words, and the Legislature has thought fit to exclude evidence of that quality when it provided for the statements of deceased persons.

It is a rule of interpretation that significance must be given to words in a statute wherever possible. If statements made by signs are included in s. 32 there will be no significance in the words " written or verbal," because the section will then cover all statements. The words are words of limitation. In the interpretation of a statute there is a presumption against redundancy.

It is submitted that the decisions of the Courts in India, which are against the appellant, are wrong.

[Reference was made to *Queen-Empress* v. *Abdullah* (1); *Ranga* v. *The Crown* (2); and *Emperor* v. *Sadhu Charan Das*. (3)]

In *Queen-Empress* v. *Abdullah* (1) Petheram C.J. said that he found difficulty in arriving at the conclusion reached by the Court, and one of the learned judges felt unable to extend the meaning of the term "verbal" in s. 32 beyond that of "a word." It is submitted that the statement must be "made" (see s. 32) substantially in words by the deceased; the very minimum requirement that could be held to be sufficient is the use of a single word.

Without the evidence of the signs it was not possible for the jury to have brought in a verdict of guilty. It appeared from the evidence that the name of the appellant was suggested to the deceased without any indication from her that he was the assailant. That suggestion exhibited the worst features of a leading question. Witnesses were allowed to state their interpretation of the signs and the inferences they drew therefrom although such evidence was inadmissible. There was no evidence upon which the appellant could have been convicted.

Sir Donald Somervell A.-G. and *Kenelm Preedy* for the Crown, were called upon to deal only with s. 32 of the Evidence Ordinance. The terms of that section are identical with those of s. 32 of the Indian Evidence Act, 1872. *Queen-Empress* v. *Abdullah* (1) was rightly decided, and the principle laid down in that case has been applied in other cases: *Ranga* v. *The Crown* (2), and *Emperor* v. *Sadhu Charan Das*. (3) Evidence of the questions put to the deceased and the signs made by her in answer thereto was rightly admitted. There was sufficient evidence to support the conviction of the appellant of murder.

Nov. 25. The judgment of their Lordships was delivered by

LORD ROCHE. This is an appeal, by special leave, against a judgment and sentence of the Supreme Court of the Island of Ceylon, dated May 1, 1935, whereby, after a trial before a

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(1) I. L. R. 7 A. 385.
(2) (1924) I. L. R. 5 Lah. 305.
(3) (1921) I. L. R. 49 C. 600.

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Commissioner and a jury, the appellant was sentenced to death for the murder of a woman named Salami Nadatchi on May 15, 1934. The jury had returned a verdict of guilty by a majority of six to one. The main point raised in the appeal was whether information given by the deceased woman before her death was a statement within the meaning of s. 32 of the Ceylon Evidence Ordinance, No. 14 of 1895, and as such was admissible in evidence by virtue of that section. This information was admitted in evidence and directly implicated the appellant. The material part of the section is as follows:—

"*Statements by Persons who cannot be called as Witnesses.*

" 32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases:—

> " (1.) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

The facts of the case as proved by evidence not the subject of objection were as follows: The deceased was a widow living alone in a two-roomed, one-storied house on a plot of land lying between the estates of one Stanley Jayawardene and one Collin Silva. The deceased's house was about 150 yards from the estate bungalow of Collin Silva, where a witness named Rengam Arumugam, watcher of the estate, lived with his wife. The accused man had worked as a carter for Stanley Jayawardene's estate and lived in the neighbourhood, but recently, and until shortly before May 15, 1934, he had been in the employment of two brothers Mohamadu a few miles away. He had been discharged from this employment some days before May 15, and was then unemployed. On the day in question he had been to the place of business of the brothers Mohamadu, had borrowed a bicycle from one of them, and gone home on it to dinner at his house, which he left after dinner about 2 P.M. Between 2 and 3 P.M. he was seen near the house of the deceased woman in conversation with her. Between 3 and 4 P.M. he was seen riding the bicycle away from that locality and was described by a witness (Charles) as dismounting and as going into a thicket and lurking there, and behaving in a suspicious and excited manner. He then, after bathing in a stream, went back on the bicycle to the place of business of the brothers Mohamadu, where he was later arrested. Meanwhile, at about 4 P.M., the deceased had come in a terribly wounded condition to the bungalow of Collin Silva occupied by Arumugam. The principal wound was one about 4 inches in length extending from the right side of her neck across the throat to about ½ an inch on the left side of the middle line. There were minor wounds on the face and head, and her ears were severed and torn. She had evidently made her way unaided from her own house and was found on the verandah of Collin Silva's bungalow. There the interrogation took place from which the evidence in dispute was derived, and in consequence the accused was arrested the same afternoon at the Mohamadus' place of business. The statement of the accused, made on May 16, was of the nature of an alibi, and in particular was to the effect that from 12.30 P.M. onwards he was at the boutique. This was proved at the trial to be untrue, as appears from the evidence summarized above.

At the trial the accused did not elect to give evidence nor was evidence called on his behalf. At the house of the deceased woman the main features of the attack upon her were plainly to be seen. There was blood on a camp cot in the outer room upon which the deceased must have been sitting or lying when attacked. The room was disturbed and jewellery which she possessed was missing. The door from this room to the outside was locked, and the wounded woman, as was indicated by blood marks, made her way into the inner room and then out of a window and thence by a path to Collin Silva's bungalow. There she was bandaged and propped up against a wall with cushions. The throat wound rendered her unable to speak; but she was fully conscious and able to understand what was said to her, and to make signs and to nod her head, though slightly. She was asked questions both by the police and by neighbours, and in particular by one Martin Perera—a carter who had worked with the accused for Mr. Stanley Jayawardene and who also knew the deceased woman. Mr. Stanley Jayawardene was present at the material time, and there was no ground for suggesting that the evidence to which objection was taken was derived solely or mainly from police sources, or that Perera or Mr. Jayawardene, who gave evidence of what took place, were witnesses with ill-will to the appellant. The greater part of the interrogation was conducted by Martin Perera, who spoke to the wounded woman in Sinhalese. The course and result of it was as follows: Asked who cut her neck, the deceased indicated by signs the height of the person and later pointed to Mr. Jayawardene and also made signs as of goading a bull. The accused had worked for Mr. Jayawardene as a carter. She also pointed to a constable and then patted or slapped her cheek two or three times. The accused had some time previously assaulted a constable by slapping his face and this was a matter of common knowledge. Probably at this stage—though the witnesses were not entirely in agreement as to the order of events—Martin Perera put the direct question: " Was it Alisandiri ? "—the name by which the accused was ordinarily known. The wounded woman nodded her head in answer to this question. As to this fact, and that it was a nod of assent, no witness seemed in any doubt. The wounded woman was removed to hospital and died there and, as has been already stated, the appellant was arrested and charged.

At the trial the admissibility of the evidence in question seems to have been raised by counsel for the defence as soon as the jury was empanelled and sworn. The jury was quite properly ordered to retire and the question of admissibility was argued and decided in their absence. An authority, *Queen-Empress* v. *Abdullah* (1), which will be referred to later

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(1) I. L. R. 7 A. 385.

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in this judgment, was cited to the learned Commissioner, and in accordance with that authority he ruled that evidence as to signs made in answer to questions put to the deceased was admissible, but that statements of witnesses as to what interpretation they put upon the signs were not admissible. It was said upon the argument of this appeal that the latter part of the ruling was not observed, and that evidence ruled inadmissible was in fact given. It is difficult to adhere to a clear line of division between the description of signs and the interpretation of signs, and it may be that in some respects witnesses trespassed beyond the line and so usurped what obviously is the function of the jury; but their Lordships observe that in some instances the matter complained of was elicited by cross-examination on behalf of the accused. Their Lordships are of opinion that no substantial grievance can be made out in this regard, still less any real or serious miscarriage of justice. The main question is whether any part of the evidence as to what passed between the deceased and Perera should have been admitted. In their Lordships' opinion the ruling of the learned Commissioner was correct. It is to be observed that in the section the word used is "verbal" and not "oral" which is used elsewhere in the Ordinance, as for example in s. 3 and s. 119 in reference to evidence given in Court. It is unnecessary to decide whether the question put "Was it Alisandiri?" and the nod of assent would have constituted an oral statement made by the deceased, but their Lordships are clearly of opinion that it constituted a verbal statement made by her. The case under consideration closely resembles the case of a person who is dumb and is able to converse by means of a finger alphabet. Upon proper evidence proving the words used in a conversation so held their Lordships think that a statement so made would be a verbal statement within the meaning of the section. So here, their Lordships think that there was proper and sufficient evidence of a verbal statement by the deceased to the effect that it was the accused who cut her neck. As to the remainder of the evidence as to signs made by the deceased, it was necessarily given in order that it might be understood in what circumstances and context the vital question came to be asked and to be answered. Mention has already been made of the decision in Allahabad upon which the learned Commissioner relied to support his ruling. This was a decision of the Full Court and was pronounced in the year 1885. Since that time it has been followed in Bengal in the case of *Emperor* v. *Sadhu Charan Das* (1); in Patna in *Chandrika Ram Kahar* v. *King-Emperor* (2); and in Lahore in *Ranga* v. *The Crown.* (3) The material provisions of the Evidence Act in India are identical with the provisions of the Ceylon Ordinance. For the reasons already given their Lordships think that those decisions were correct and that the learned Commissioner was right in following them.

Observations were properly and forcibly made by counsel for the appellant as to the caution required in the reception of evidence of this character and in the use to be made of it. It is, of course, true that evidence of signs of an ambiguous or uncertain character ought not to be admitted at all, and that in many cases the evidence, though admissible, might be of little weight. It is no doubt also true that answers to questions of a leading character may be of little weight; but in the circumstances of this case Martin Perera's question was in its context other than a mere leading question. At any rate, all such matters are matters for the jury, going to the weight and not to the admissibility of the evidence, and there is nothing here to show that anything took place in this connection calling for or justifying the interference of this Board. Unfortunately, neither the advisers of the appellant nor the Crown were able to trace or produce any note of the summing-up. In the absence of any suggestion, based on any other materials, that the summing-up was open to objection, their Lordships can only assume that the learned Commissioner who heard the argument on the admissibility of the evidence with regularity, and ruled upon it, as their Lordships have decided, correctly, also directed the jury adequately and properly as to the weight of the evidence.

(1) I. L. R. 49 C. 600.
(2) I. L. R. 1 Pat. 401.
(3) I. L. R. 5 Lah. 305.

The result seems to their Lordships to be this: Apart from the evidence proceeding from the deceased woman, the other evidence was not sufficient to warrant a conviction, but at the same time that other evidence was not merely consistent with the deceased's statement but pointed in the same direction. It was a case in which, if the deceased's statement was received, and was believed, as it evidently was by the jury, to be clear and unmistakable in its effect, then a conviction was abundantly justified and, indeed, inevitable. For these reasons their Lordships have felt themselves impelled to advise His Majesty that this appeal should be dismissed.

Solicitors for the appellant: *Douglas Grant & Dold.*
Solicitors for the respondent: *Burchells.*

[PRIVY COUNCIL.]

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M. A. L. M. SOCKALINGAM CHETTIAR AND ANOTHER . . . . APPELLANTS ;

AND

D. P. RAMANAYAKE AND ANOTHER . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

Ceylon — Moneylender — Loans upon promissory notes secured by mortgage bond—Statutory defect in promissory notes—Unenforceable —Claim to recover loans—Court's jurisdiction to re-open transactions and take accounts—Promissory notes not admissible in evidence to prove loans—Ceylon Money Lending Ordinance, No. 2 *of* 1918, *ss.* 2, 8, 10, 13 *and* 14.

By a mortgage bond the respondent mortgaged certain property therein specified as security for the repayment of sums of money lent to him by the appellants upon certain promissory notes. The promissory notes admittedly did not comply with the provisions of s. 10, sub-s. 1, of the Ceylon Money Lending Ordinance, 1918, inasmuch as they did not state the " interest, premium, or charges " deducted or paid in advance, and they were consequently unenforceable under sub-s. 2 of s. 10 of the Ordinance. It was further admitted that the default was not due to inadvertence, and that the promissory notes must be taken to be fictitious to the knowledge of the lender within the meaning of s. 14 of the Ordinance. On a claim by the appellants to recover the sums lent on the security of the bond and upon the promissory notes :—

Held, that although the promissory notes were notes in which the amounts stated as due were to the knowledge of the lender fictitious within the meaning of s. 14 of the Ordinance, and could not be enforced by reason of the provisions of s. 10, the trial judge had jurisdiction under s. 2 of the Ordinance to re-open the transactions and to take an account between the lender and the person sued.

The provisions of s. 13 of the Ordinance, which make the taker of a fictitious promissory note liable to a penalty, do not prevent the Court from re-opening the transaction and taking the account under the provisions of s. 2.

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* *Present :* LORD MAUGHAM, LORD SALVESEN, and SIR LANCELOT SANDERSON.

Where, however, the trial judge exercises his discretion and re-opens the transaction and takes the account, the unenforceable promissory notes must not be admitted in evidence to prove the loans.

Decrees of the Supreme Court of the Island of Ceylon reversed.

Appeal (No. 30 of 1934) from two decrees of the Supreme Court of the Island of Ceylon (August 1, 1933) reversing an order and a decree of the District Court of Colombo (December 9 and 21, 1932).

The appellants, moneylenders, brought an action against the respondents and a third defendant to recover a total sum of Rs.129,415/87 with interest, alleged to be due to them from the first respondent in respect of loans made to him, and to enforce against the respondents and the third defendant a mortgage bond, dated July 28, 1928, executed as security for the loans.

The main point which arose for decision was whether a person carrying on in Ceylon the business of moneylending, who had taken as security for a loan a promissory note which by reason of the provisions of the Ceylon Money Lending Ordinance, 1918, was unenforceable, was thereby precluded from recovering the actual amount of the loan.

The facts and the relevant provisions of the Ceylon Money Lending Ordinance appear from the judgment of the Judicial Committee.

The District Court at Colombo decided that the promissory notes given by the first respondent as security for the loans did not comply with the provisions of the Money Lending Ordinance because the amounts deducted as interest did not appear in the margin of the notes, which were therefore unenforceable, but he held that the loans themselves were legal and could be recovered by the lenders, and that the notes were admissible in evidence to show the amounts due. He ordered the moneylending transactions to be re-opened and an account taken as to the amounts actually lent and not repaid and reasonable interest thereon. He then investigated the accounts and made a decree in favour of the appellants for the amount found to be due, with interest thereon, and

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made an order for the enforcement of the mortgage bond given by the respondents as security for the payment of the loans.

Upon appeal, the Supreme Court (Dalton A.C.J. and Koch A.P.J.) held that because the promissory notes did not comply with the Ordinance, and because a penalty was imposed by s. 13 of the Ordinance upon the taking of such promissory notes by a moneylender, the whole of the moneylending transactions were illegal and void, and the appellants could not recover any part of the sums lent by them to the respondents.

1936. Oct. 19, 20 and 22. *Montgomery K.C.*, *Hallett K.C.* and *L. M. D. de Silva* for the appellants. It is alleged by the respondents that because the promissory notes were vitiated the Ordinance made the whole transaction void, and nothing can be recovered. The transaction which is made illegal by the Ordinance is only the taking of a security in the wrong form, while the transaction upon which the appellants are suing is not concerned with that at all: it is the mere transaction of lending and borrowing money, which is not made illegal. The question is, what is the transaction on which the appellants sue? The contract to repay loans made upon the security contained in the mortgage bond was admittedly legal, and the loans were made pursuant to and upon the security of that bond. [Sects. 2, 8, 10, 13 and 14 of the Ceylon Money Lending Ordinance, No. 2 of 1918, were read.] It is admitted that the promissory notes were fictitious within the meaning of s. 14 of the Ordinance, and were therefore unenforceable. The appellants contend, however, that they are entitled to prove the loans, no matter how illegal the notes may be, and that the promissory notes were admissible in evidence, if necessary, to prove the making of the loans. Even if the promissory notes be illegal the appellants are still entitled to recover on the money count. The Supreme Court said that the two actions must be welded together, and that the transaction which is illegal includes the lending of the money. It is conceded that for the appellants to succeed a money count must be put in. [Reference was made to *Valliappa Chetty* v. *Silva* (1) and *Master* v. *Miller.* (2)] The Supreme Court stated that "the established rule of law, as stated by Bowen L.J. in *Melliss* v. *Shirley Local Board* (3), is and always has been that no action can be maintained on a contract which is prohibited either by common law or by statute." That rule of law is not disputed. Here, however, the original transaction of loan and the promise to pay, assumed to be contained in the mortgage bond, was perfectly legal: it is impossible to treat as an essential part of that transaction an illegal transaction which consists of the taking of an illegal promissory note. It is reasonably clear that the lending transaction was entirely dissociated from the giving of the note. A void security will not avoid the debt, and it does not matter whether the security is void or voidable: the debt is there, and any proof may be given that the money was lent: *Sutton* v. *Toomer.* (4)

[LORD MAUGHAM. In *Sutton* v. *Toomer* (4) there was a perfectly valid promissory note given at the time the loan was made; it was not until some time later that the alteration was made which made it a document which could not be sued upon. There was no difficulty there in proving that there was an original debt.]

Sutton's case (4) was followed in *Valliappa Chetty* v. *Silva.* (5) The promissory note was also valid at the time it was given in *Master* v. *Miller.* (6) Under the old law, which has not been altered, it was always possible, whether the document were a cheque, a promissory note or any negotiable instrument, to sue on the ordinary money count as soon as the time had come and the money had not been paid. The appellants could and did establish their cause of action irrespective of the promissory notes. An action on promissory notes is not the same cause of action as an action for money lent: they are quite independent: *Palaniappa* v. *Saminathan.* (7) That a

(1) (1918) 20 Ceylon N. L. R. 340.

(2) (1791) 4 T. R. 320.

(3) (1885) 16 Q. B. D. 446.

(4) (1827) 7 B. & C. 416, 418.

(5) 20 Ceylon N. L. R. 340, 341–2.

(6) 4 T. R. 320, 347.

(7) (1913) 17 Ceylon N. L. R. 56, 59–60.

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disclosed illegality will not affect the action unless the illegality is a part of the cause of action, see *Gordon* v. *Chief Commissioner of Metropolitan Police.* (1) Even if the taking of "fictitious" promissory notes as security for a loan be illegal under s. 13 of the Ordinance, and even if such notes be therefore void, s. 13 does not render the loan illegal or irrecoverable. The decrees of the Supreme Court should be set aside.

Hallett K.C. followed, and referred to Bullen & Leake's Precedents and Pleadings, third ed., pp. 37, 540, and to *Sokalingam Chettiar* v. *Ramanayake.* (2)

Chinna Durai and *Lady Chatterjee* for the respondents. The whole purpose of the Money Lending Ordinance is to protect the borrowing public. The appellants rely on proof of the loan. According to s. 10 the promissory notes are not enforceable at all. If they are not—being fictitious and prohibited transactions—there is an end of the matter. That is the remedy which the Legislature thought that the public should be entitled to. Sect. 2 of the Ordinance attempts to defeat the purposes of s. 10, but the operation of the former section is confined to the borrower or to someone to whom his security has passed, for otherwise it would be inconsistent with s. 10. The promissory notes are further illegal within the meaning of ss. 13 and 14 of the Ordinance and no action can be maintained upon them by the appellants. In the alternative, the appellants' claim based on the bond is equally unenforceable and illegal as being dependent on unenforceable and illegal promissory notes. Sect. 10 says that the security is unenforceable if it is illegal or fictitious; here the security includes not only the promise to pay but the act of lending, the one cannot be separated from the other. Apart from the promissory notes, where is the implied contract? There is no promise in the mortgage bond; that does not come into play. In any case, money lent under that bond must be in connection with promissory notes, and if the promissory notes fail then the bond automatically drops. The distinctions between *Sutton* v. *Toomer* (3) and the present case are, first,

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(1) [1910] 2 K. B. 1080, 1098.
(2) (1932) 33 Ceylon N. L. R. 319.
(3) 7 B. & C. 416.

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that the document in *Sutton's* case (1) was in the first instance a perfectly proper one, and secondly, there was no special Ordinance in that case. *Valliappa Chetty* v. *Silva* (2) was heard before the Ordinance. In *Palaniappa* v. *Saminathan* (3) the document was unenforceable through an innocent act; in the present case the acts of omission of the appellants are admitted. [Reference was also made to *Anderson, Ld.* v. *Daniel* (4); *Scott* v. *Brown, Doering, McNab & Co.* (5); and *Gordon* v. *Chief Commissioner of Metropolitan Police.* (6)] Further, the appellants are not entitled to enforce any claim in respect of any transaction under the bond as they failed to comply with the requirements of s. 8 of the Ordinance with regard to keeping accounts. The District Judge was wrong in directing a re-opening of the transactions between the parties under s. 2 of the Ordinance after holding that the promissory notes were unenforceable.

Lady Chatterjee followed. It has been argued that the appellants are entitled to sue on the bond or a money count. The bond is merely a statement of terms on which one party may choose to borrow; it is not a contract of loan, nor have the terms of the bond been complied with, in that an excessive rate of interest has been charged. What, then, is the contract of loan? It is the promissory note. It has been found extremely difficult to know exactly when s. 2 of the Ordinance comes into operation when s. 10 has not been complied with: *Ramen Chetty* v. *Renganathan Pillai* (7); *Fernando* v. *Fernando* (8); and *Wickremesuriya* v. *Silva.* (9)

November 19. The judgment of their Lordships was delivered by SIR LANCELOT SANDERSON. This is an appeal by the plaintiffs against two decrees of the Supreme Court of the Island of Ceylon, dated August 1, 1933, whereby the Supreme Court set aside an order and a decree of the District Court of Colombo, dated December 9 and 21, 1932, respectively,

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(1) 7 B. & C. 416.
(2) 20 Ceylon N. L. R. 340.
(3) 17 Ceylon N. L. R. 56.
(4) [1924] 1 K. B. 138.
(5) [1892] 2 Q. B. 724.
(6) [1910] 2 K. B. 1080.
(7) (1927) 28 Ceylon N. L. R. 339, 343.
(8) (1934) 36 Ceylon N. L. R. 77.
(9) (1935) 37 Ceylon N. L. R. 274.

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and dismissed the action with costs. The respondents are the first and second defendants in the action.

The material facts are as follows: By a mortgage bond, dated July 28, 1928, the first defendant (Ramanayake) covenanted with the first plaintiff (Sockalingam) and one Ramasamy to pay any sum of money which might thereafter be or become owing and payable to the first plaintiff or the said Ramasamy, or either of them, upon or in respect of any promissory notes or cheques made or endorsed by the first defendant, or upon chits, tundus or other writings, or in respect of any loans or advances, or in respect of any accounts or transactions whatsoever, with interest at the rate of 12 per cent. per annum. The bond further secured all such sums by the mortgage of certain properties therein specified.

On April 1, 1931, the said Ramasamy assigned all his rights under the said mortgage bond to the second plaintiff, and the action in which this appeal arises was brought on the same day. The plaintiffs thereby sought to recover the sum of Rs.129,415/87 alleged to be due in respect of money lent on the security of the said bond and upon certain promissory notes: they prayed further for the usual mortgage decree for sale of the mortgaged property in default of payment of the said sum. The second defendant was made a party to the action as a puisne encumbrancer of the mortgaged property.

Certain pleas were made and issues raised to which it is not now necessary to refer, and the questions which arise in this appeal relate to the issues numbered 8 and 9 in the judgment of the District Judge. They are as follows:—

"(8.) Are the promissory notes mentioned in paragraph (6) of the plaint or any notes of which they are renewals not enforceable by reason of the failure to give details required by s. 10 of Ordinance 2 of 1918? (9.) In view of the several allegations in the plaint is the second defendant entitled to ask that the transactions between the 1st defendant and the plaintiffs or either of them be re-opened and an account taken?"

The District Judge decided that the promissory notes in

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question were themselves not enforceable, but at the same time he held that they were admissible in evidence to prove the amount due on the mortgage bond. On the 9th issue he held that the second defendant was entitled to ask that the transactions between the plaintiffs and the first defendant should be re-opened. Accordingly on December 9, 1932, he directed the plaintiffs to file in Court a statement showing the moneys actually lent by the first plaintiff and Ramasamy to the first defendant from time to time on promissory notes, the amount of interest actually deducted in advance, the interest which they were entitled to deduct if calculated at 12 per cent. for the period when each note fell due, and the amounts paid by the first defendant with the date of each payment.

Accounts were filed by the plaintiffs in accordance with the said order, and on December 21, 1932, the District Judge, after investigating the accounts and hearing evidence, held that a sum of Rs.10,518/13 had been overcharged by the first plaintiff, and that a sum of Rs.7378/96 had been overcharged by the second plaintiff. He therefore made a decree that the first defendant should pay to the plaintiffs jointly the sum of Rs.111,518/78 with interest thereon at 12 per cent. per annum from April 1, 1931, to date of decree, and thereafter on the aggregate amount of the decree at 9 per cent. per annum till payment in full, and costs of suit forthwith. He further made the usual mortgage decree in respect of the said sums.

The first and second defendants appealed to the Supreme Court by two petitions. The first was against the order of the District Judge of December 9, 1932, and the second against the decree of the said judge dated December 21, 1932. The Supreme Court held that, as the plaintiffs were moneylenders, the provisions of the ordinance relating to moneylending—namely, No. 2 of 1918—applied to the transactions, that the promissory notes failed to comply with the provisions of s. 10 of the ordinance because some of them did not show the amount of money deducted as interest paid in advance, and because others, which were renewal notes, failed to show the capital sum actually borrowed; and that under sub-s. 2 of the said section the promissory notes were not enforceable. The Court held that though the bond was not in itself illegal, the promissory notes were illegal, and that the Court would refuse to enforce the security for those illegal transactions, the bond so far as it secured the illegal transactions being tainted with the same illegality.

Accordingly, on August 1, 1933, by the two decrees of that date, the Supreme Court allowed both appeals, set aside the order and decree of the District Judge, dismissed the plaintiffs' action, and directed that the plaintiffs should pay the taxed costs of the first and second defendants. It is against the above mentioned decrees that the plaintiffs have appealed to His Majesty in Council.

The material sections of the ordinance are as follows:—

"2.—(1.) Where proceedings are taken in any court for the recovery of any money lent after the commencement of this Ordinance, or the enforcement of any agreement or security made or taken after the commencement of this Ordinance in respect of money lent either before or after the commencement of this Ordinance, and there is evidence which satisfies the court—

(*a*) That the return to be received by the creditor over and above what was actually lent (whether the same is charged or sought to be recovered specifically by way of interest, or in respect of expenses, inquiries, fines, bonuses, premia, renewals, charges, or otherwise), having regard to any sums already paid on account, is excessive, and that the transaction was harsh and unconscionable, or, as between the parties thereto, substantially unfair; or

(*b*) That the transaction was induced by undue influence, or is otherwise such that according to any recognized principle of law or equity the court would give relief; or

(*c*) That the lender took as security for the loan a promissory note or other obligation in which the amount stated as due was to the knowledge of the lender fictitious, or the amount due was left blank—

the court may re-open the transaction and take an account

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between the lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest, and charges as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable ; and if any such excess has been paid or allowed in account by the debtor, may order the creditor to refund it ; and may set aside, either wholly or in part, or revise, or alter any security given or agreement made in respect of money lent, and if the lender has parted with the security may order him to indemnify the borrower or other person sued.

(2.) Any court in which proceedings might be taken for the recovery of money lent shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under the last preceding sub-section, and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Ordinance by the borrower or surety or other person liable, notwithstanding that the time for repayment of the loan or any instalment thereof may not have arrived.

(3.) In any insolvency proceedings on any application relating to the admission or amount of a proof in respect of any money lent, the Court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money.

(4.) The foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially one of money lending.

(5.) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any court.

8.—(1.) A person who carries on the business of money lending, or who advertises or announces himself or holds himself out in any way as carrying on that business, shall keep or cause to be kept a regular account of each loan, clearly

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stating in plain words and numerals the items and transactions incidental to the account, and entered in a book paged and bound in such a manner as not to facilitate the elimination of pages or the interpolation or substitution of new pages.

(2.) If any person, subject to the obligations of this section, fails to comply with any of the requirements thereof, he shall not be entitled to enforce any claim in respect of any transaction in relation to which the default shall have been made.

Provided that in any case in which the court is satisfied—

(*a*) That the default was due to inadvertence and not to any intention to evade the provisions of this section ; and

(*b*) That the receipt of the loan, the amount thereof, the amount of the payments on account, and the other material transactions relating thereto satisfactorily appear by other evidence—

the court may give relief against any such default on such terms as it may deem just.

10.—(1.) In every promissory note given as security for the loan of money after the commencement of this Ordinance, there shall be separately and distinctly set forth upon the document—

(*a*) The capital sum actually borrowed ;

(*b*) The amount of any sum deducted or paid at or about the time of the loan as interest, premium, or charges paid in advance ; and

(*c*) The rate of interest per centum per annum payable in respect of such loan.

(2.) Any promissory note not complying with the provisions of this section shall not be enforceable.

Provided that in any case in which the court shall be satisfied that the default was due to inadvertence and not to any intention to evade the provisions of this section, it may give relief against the effect of this sub-section on such terms as it may deem just.

(3.) The setting forth of the particulars required by sub-section (1.) shall not affect the negotiability of any promissory note.

(4.) Any promissory note setting forth the said particulars substantially in the form given in the schedule to this Ordinance shall be deemed to be in compliance with this section.

(5.) The provisions of this section shall apply to renewals of any loan, and in all such cases the amount stated as the capital sum actually borrowed shall be the amount of the original loan.

13. Any person who shall take as security for any loan a promissory note or other obligation in which the amount stated as due is to the knowledge of the lender fictitious, or in which the amount due is left blank, shall be guilty of an offence, and shall be liable on conviction to a fine not exceeding five hundred rupees, or in the event of a second or subsequent offence, either to a fine not exceeding one thousand rupees, or to simple imprisonment for a period not exceeding six months.

14. A promissory note given in respect of a loan with regard to which a deduction was made or a sum paid at or about the time of the loan in respect of interest, premium, or charges payable in advance, without such deduction or payment being set forth upon the document in accordance with section 10 (unless the circumstances are such as reasonably to entitle the lender to relief under that section), and any promissory note or other obligation in respect of a loan, with regard to which at or about the time of the loan any payment was made, or any collateral transaction entered into with a view to disguising the actual amount of the sum advanced, or the rate of interest payable in respect thereof, shall be deemed to be a promissory note or obligation in which the amount stated as due is, to the knowledge of the lender, fictitious within the meaning of sections 2 and 13 of this Ordinance."

SCHEDULE.

Promissory Note given in respect of a Loan.

Stamp.

On demand (*or*———months after date) I promise to pay

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to———, or order, the sum of Rupees———, with interest thereon at the rate of———per centum per annum.

(Signature of Borrower.)

Particulars required by "The Money Lending Ordinance, No. 2 of 1918."

1. Capital sum borrowed, Rs.——.

2. Interest, premium, or charges deducted or paid in advance, if any, Rs.——.

3. Rate of interest per centum per annum ——.

At the hearing of the appeal before their Lordships it was admitted by learned counsel for the plaintiffs that the promissory notes did not comply with the provisions of s. 10 inasmuch as they did not state the interest premium or charges deducted or paid in advance, and consequently that the promissory notes were not enforceable. Further, it was admitted that the default was not due to inadvertence, and that the promissory notes must be taken to be fictitious within the meaning of the ordinance to the knowledge of the lenders. It was contended, however, that the District Judge had jurisdiction to re-open the transactions under s. 2 of the ordinance and to take an account between the lenders—namely, the plaintiffs and the person sued—namely, the first defendant, and relieve the first defendant from payment of any sum in excess of the sum adjudged by the District Judge to be fairly due in respect of principal, interest and charges as the District Judge might adjudge to be reasonable.

On the other hand, it was contended on behalf of the defendants that inasmuch as the promissory notes were taken as security for the loans and were not only unenforceable by reason of s. 10 of the ordinance but were, by necessary implication from s. 13, prohibited, the plaintiffs were not entitled to recover the loans, or any part thereof.

In considering the above mentioned contentions the first thing to be observed is that in the ordinance the loan is treated as being something different from the promissory note, which is therein described as a security. The provisions of s. 10

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make that clear. The section begins with the sentence, "In every promissory note given as security for the loan of money." This must be remembered in construing the material words of s. 10, sub-s. 2, namely: "any promissory note not complying with the provisions of this section shall not be enforceable," that is to say, the security, consisting of the promissory note, for the loan is not to be enforceable. The sub-section does not provide that the loan shall be irrecoverable. If that had been intended it could easily have been so provided. It is to be noted that the above mentioned provision is very different from the words of s. 8, sub-s. 2, which provides that: "If any person, subject to the obligations of this section, fails to comply with any of the requirements thereof, he shall not be entitled to enforce any claim in respect of such transaction in relation to which the default shall have been made." The difference between the provisions of the two above mentioned sections is striking, and it is abundantly clear that when it was intended to prevent any claim in respect of a transaction being enforced, it was stated in clear and unmistakeable language.

In their Lordships' opinion, s. 2 affords evidence that the provisions of s. 10 were not intended to make the loan therein referred to irrecoverable; for that section provides that where proceedings are taken in any Court for the recovery of any money lent or the enforcement of any security made or taken after the commencement of the ordinance in respect of any money lent, the Court may re-open the transaction in certain events. One of the events is if the Court is satisfied that the lender took as security for the loan a promissory note in which the amount stated as due was to the knowledge of the lender fictitious or the amount due left blank.

To ascertain what is meant by the phrase in this section "a promissory note in which the amount stated as due was to the knowledge of the lender fictitious" reference must be made to s. 14, which provides that a promissory note given in respect of a loan with regard to which a deduction was made or a sum paid at the time of the loan in respect of interest premium or charges payable in advance without such deduction

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or payment being set forth upon the document in accordance with s. 10 (subject to the proviso therein stated) is to be deemed to be a promissory note in which the amount stated as due is to the knowledge of the lender fictitious within the meaning of ss. 2 and 13 of the ordinance.

It follows, therefore, that although the promissory notes in this case were notes in which the amounts stated as due were to the knowledge of the lender fictitious within the meaning of s. 14, and could not be enforced by reason of the provisions of s. 10, the Court had jurisdiction under s. 2 of the ordinance to re-open the transaction and to take an account between the plaintiffs and the first defendant.

It was argued on behalf of the defendants that s. 2 applies only to cases where action is taken by the borrower or by a third person to whom the security in question has passed by way of assignment, and that otherwise s. 2 would be inconsistent with the provisions of s. 10. Their Lordships are unable to accept that contention. The provisions of the section are clear and unqualified, and there is no justification for putting a construction upon the section which confines the jurisdiction of the Court to the cases suggested in the argument. Further, it appears to their Lordships that there is no inconsistency between s. 2 and s. 10. Sect. 10 provides that if the Court is satisfied that the default was due to inadvertence and not to any intention to evade the provisions of the section the Court may give relief on such terms as it may deem just. That provision is directed to a state of things quite different from that contemplated in s. 2, which provides for a case where the lender has taken as security for the loan a promissory note in which the amount stated as due was *to the knowledge* of the lender fictitious. In such a case jurisdiction is given to the Court to re-open the transaction and to take an account of what is actually due to the lender.

Stress was laid by learned counsel for the defendants upon the provisions of s. 13, and it was argued that inasmuch as the ordinance provided a penalty for taking a "fictitious" promissory note as security for a loan, it must have been

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intended that the loan could not be recovered. There is no doubt that this section and other sections of the ordinance were intended for the protection of members of the public who might be borrowers from moneylenders, and it is quite intelligible that it was considered of great importance that a promissory note taken by a moneylender as security for a loan should bear on the face of it the particulars specified in s. 10, and that with a view to enforce such protection a penalty was imposed on the moneylender in the event of his non-compliance with the provisions thereof. It does not necessarily follow that it was intended that the loan in respect of which such "fictitious" promissory notes were taken should be irrecoverable, and when the other sections of the ordinance are taken into consideration, and in the absence of any specific provision such as is found in s. 8, sub-s. 2, to the effect that the moneylender should not be entitled to enforce his claim, their Lordships are of opinion that the provisions of s. 13 do not prevent the Court from re-opening the transaction and taking the account under the provisions of s. 2.

Their Lordships cannot refrain from saying that in their opinion the true construction of the provisions of the ordinance is by no means free from difficulty, and they appreciate the point of view adopted by the learned judges of the Supreme Court, and the reasons stated in support thereof, but after due consideration they have come to the conclusion that the District Judge was right in holding that he had jurisdiction to re-open the transaction and to take the account between the plaintiffs and the first defendant. That being so, it was in his discretion to decide whether he should re-open the transaction and take the account, and their Lordships are not prepared to hold that he exercised that discretion wrongly.

Their Lordships, however, are of opinion that the promissory notes which were not enforceable by reason of s. 10 and, by implication from s. 13, prohibited, should not have been admitted in evidence to prove the loans. It is to be observed that the admission in evidence of the notes would make the

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sections practically valueless. Their Lordships' attention was drawn to certain English decisions, to which in their opinion it is not necessary to refer, inasmuch as their Lordships' decision is based upon the true construction of the provisions of the ordinance.

The learned counsel for the defendants desired to rely on the provisions of s. 8 of the ordinance, alleging that the books of the plaintiffs were not kept in accordance with the terms of that section. It appears, however, that the defendants wished to raise an issue upon this point at the trial, and upon objection by the plaintiffs the District Judge refused to allow that matter to be relied upon by the defendants as it had not been referred to in the pleadings, and he declined to state any issue in respect thereof. Their Lordships are of opinion that the District Judge's decision was right in this respect, since the proposed issue might well have involved the calling of evidence, and they refused to allow learned counsel for the defendants to argue the point. It must be clearly understood that on the further taking of accounts, to which reference will presently be made, the above mentioned defence will not be open to the defendants.

The District Judge apparently allowed a rate of interest higher than 12 per cent. per annum in respect of certain loans for short periods. In their Lordships' opinion this was not permissible, and that matter alone would necessitate a further taking of the account. The more important matter, however, is the admission by the District Judge of the promissory notes, which were not enforceable, as evidence to prove the loans, which as already stated was not permissible.

In their Lordships' opinion the proper course is to remit the case to the Supreme Court in order that the Supreme Court may give such directions as are necessary for taking a further account between the parties to ascertain what amount is due by the first defendant to the plaintiffs in respect of money lent and interest at the rate of 12 per cent. per annum, on the footing that the promissory notes given by the defendants are neither enforceable, nor admissible in evidence to prove the loans. The plaintiffs will be entitled to the usual mortgage decree for such amount, if any, as may be found due to them on the taking of the further account. It will be in the discretion of the Supreme Court to make such orders as are necessary for carrying out this direction, but their Lordships are of opinion that the further account should not be taken by the District Judge who took the account in the first instance. It is, of course, not intended to make any reflection upon the learned judge, but he, having seen the promissory notes and admitted them in evidence, might be placed in a difficult position if he were asked to take the account again.

The result is that the appeal must be allowed, and the two decrees of the Supreme Court and the order and decree of the District Judge must be set aside, and the matter remitted to the Supreme Court with the above mentioned direction. The defendants must pay to the plaintiffs their costs of the appeals to the Supreme Court and two-thirds of their costs of the appeal to His Majesty in Council. There will be no order as to the costs of the suit except that the plaintiffs must pay to the defendants the costs incurred by them in respect of the taking of the account directed by the District Judge and in respect of the further hearing before the District Judge on December 21, 1932.

The procedure to be adopted for the taking of the account hereby directed, and the costs thereof, will be a matter for the direction of the Supreme Court.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Lee & Pembertons.*

Solicitors for respondents: *Hy. S. L. Polak & Co.*

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R. VENKATA RAO . . . . APPELLANT;

AND

SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

India—Civil Servant—Alleged wrongful dismissal—Non-compliance with Rules respecting inquiry—Action for damages—Dismissal at pleasure—Rules not part of contract—No right of action—Redress of grievances by administrative process—Government of India Act, 1915 (5 *&* 6 *Geo.* 5, *c.* 61), *as amended by the Government of India (Amendment) Act,* 1916 (6 *&* 7 *Geo.* 5, *c.* 37), *and the Government of India Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 101), *and reprinted in* 1929 *as the Government of India Act: s.* 96B, *sub-ss.* 1, 2, 3, 4 *and* 5—*Civil Services Classification Rules,* 1920 (*as amended to* 1924), *rr.* XIII., XIV., XV., XVI. *and* XXVIII.

The appellant, who held office in the civil service of the Crown in India as a reader in the Government Press, Madras, fell under suspicion of being concerned in a leakage of information in respect of certain examination papers, and was dismissed from the service. On a claim against the Secretary of State for India in Council for damages for wrongful dismissal:—

Held, that the procedure prescribed by r. XIV. of the Civil Services Classification Rules, 1920–24, made under s. 96B, sub-s. 2, of the Government of India Act, was not followed at the official inquiry which preceded the dismissal. The appellant's employment, however, was not of a limited and special kind during pleasure with an added contractual term that the procedure prescribed by the Rules must be observed; it was by the express terms of s. 96B held "during His Majesty's pleasure," and no right of action as claimed by the appellant existed. The terms of s. 96B assure that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action, but will be regulated by the rules, which are manifold in number, most minute in particularity and all capable of change, but there was no right in the appellant, enforceable by action, to hold his office in accordance with those rules, and he could therefore be dismissed notwithstanding the failure to observe the procedure prescribed by them.

Sect. 96B and the rules make provision for the redress of grievances by administrative process.

Shenton v. *Smith* [1895] A. C. 229, and *Gould* v. *Stuart* [1896] A. C. 575, considered and distinguished on the facts.

Decree of the High Court (1934) I. L. R. 57 M. 857, affirmed.

APPEAL (No. 15 of 1936), in forma pauperis, by special leave,

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* *Present:* LORD ROCHE, SIR SHADI LAL, and SIR GEORGE RANKIN.

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from a decree of the High Court in its appellate jurisdiction (December 19, 1933), affirming a decree of the High Court in its original jurisdiction (August 26, 1930).

The appellant, R. Venkata Rao, was a reader in the Government Press, Madras, holding a permanent and pensionable post. In May, 1924, he was under suspicion in connection with the leakage of pleadership examination papers. On September 22, 1924, he was dismissed from the service. On December 17, 1927, he brought the present action against the respondent, the Secretary of State for India in Council, pleading his innocence, and alleging that he had been dismissed without the inquiry prescribed by r. XIV. of the Civil Services Classification Rules, made under s. 96B of the Government of India Act, and claiming Rs.15,000 as damages for wrongful dismissal. The defendant pleaded that the relevant statutory rules had been substantially complied with; that he was entitled to dismiss his servants at pleasure; and that the Court had no jurisdiction to entertain the suit.

The facts, and the relevant statutory provisions and rules appear from the judgment of the Judicial Committee.

The suit was tried by Waller J., who held that the inquiry that had been held was not of the kind prescribed by r. XIV., but he decided the questions of law against the appellant.

The Appellate Court (Beasley C.J. and Bardswell J.) were also of opinion that the procedure prescribed by the rules had not been followed, but they agreed with Waller J. on the questions of law and dismissed the appeal. The appeal is reported at (1934) I. L. R. 57 M. 857.

1936. November 5, 6, 9 and 10. *Subba Row* and *Ralph Parikh* for the appellant.

Dunne K.C. and *Wallach* for the respondent.

[This appeal was heard at the same time as *R. T. Rangachari* v. *Secretary of State for India in Council* (1937) L. R. 64 I. A. 40, where the argument is reported.]

Dec. 8. The judgment of their Lordships was delivered by

LORD ROCHE. This is an appeal against a decree, dated

December 19, 1933, of the High Court of Judicature at Madras in its appellate jurisdiction, affirming a judgment of the High Court in its original jurisdiction dismissing the action of the present appellant, the plaintiff in the action. The action was one claiming damages for wrongful dismissal from government service, and the questions involved were whether the dismissal was in fact wrongful and in breach of the material rules of the service and, if so, whether the suit for damages was maintainable.

The facts of the case were these: The appellant in May, 1924, was a reader in the Government Press, Madras, and as such reader held office in the civil service of the Crown in India. In May, 1924, he fell under suspicion of being concerned in a leakage of information in respect of pleadership examination papers. The appellant consistently and stoutly denied the charge. The matter was investigated, and at first the appellant was directed to vindicate his character in a court of law. He proceeded to do so by action for libel against a candidate for examination who was said to have informed against him. In this action he ultimately got judgment by default for nominal damages. But before the case was determined the appellant was, on August 23, 1924, suspended, and on September 22 dismissed from the service. An appeal to the Madras Government by memorial was rejected. The present suit was brought on December 17, 1927. In the plaint, as in the memorial to Government, the appellant in addition to his arguments as to innocence in fact complained that the dismissal was contrary to the statute inasmuch as it was not preceded by any such inquiry as is prescribed by r. XIV. of the Civil Services Classification Rules made thereunder. The material section of the statute (Government of India Act), is s. 96B, which reads as follows:—

"(1.) Subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service

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may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed.

"If any such person appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a governor's province, and on due application made to that superior does not receive the redress to which he may consider himself entitled, he may, without prejudice to any other right of redress, complain to the governor of the province in order to obtain justice, and the governor is hereby directed to examine such complaint and require such action to be taken thereon as may appear to him to be just and equitable.

"(2.) The Secretary of State in Council may make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General in Council or to local governments, or authorise the Indian legislature or local legislatures to make laws regulating the public services:

"Provided that every person appointed before the commencement of the Government of India Act, 1919, by the Secretary of State in Council to the civil service of the Crown in India shall retain all his existing or accruing rights, or shall receive such compensation for the loss of any of them as the Secretary of State in Council may consider just and equitable.

"(3.) The right to pensions and the scale and conditions of pensions of all persons in the civil service of the Crown in India appointed by the Secretary of State in Council shall be regulated in accordance with the rules in force at the time of the passing of the Government of India Act, 1919. Any such rules may be varied or added to by the Secretary of State in Council and shall have effect as so varied or added to, but any such variation or addition shall not adversely affect the pension of any member of the service appointed before the date thereof.

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" Nothing in this section or in any rule thereunder shall prejudice the rights to which any person may, or may have, become entitled under the provisions in relation to pensions contained in the East India Annuity Funds Act, 1874.

" (4.) For the removal of doubts, it is hereby declared that all rules or other provisions in operation at the time of the passing of the Government of India Act, 1919, whether made by the Secretary of State in Council or by any other authority, relating to the civil service of the Crown in India, were duly made in accordance with the powers in that behalf, and are confirmed, but any such rules or provisions may be revoked, varied, or added to by rules or laws made under this section.

" (5.) No rules or other provisions made or confirmed under this section shall be construed to limit or abridge the power of the Secretary of State in Council to deal with the case of any person in the civil service of the Crown in India in such manner as may appear to him to be just and equitable, and any rules made by the Secretary of State in Council under sub-section 2 of this section delegating the power of making rules may provide for dispensing with or relaxing the requirements of such rules to such extent and in such manner as may be prescribed :

" Provided that where any such rule or provision is applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by the rule or provision."

Amongst the rules made or confirmed under the above section are certain Classification Rules of which the following are the most material :—

" XIII. Without prejudice to the provisions of any law for the time being in force, the Local Government may for good and sufficient reasons—

" (1.) censure,
" (2.) withhold promotion from,
" (3.) reduce to a lower post,
" (4.) suspend,
" (5.) remove, or
" (6.) dismiss

any officer holding a post in a provincial or subordinate service or a special appointment.

"XIV. Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, in all cases in which the dismissal, removal or reduction of any officer is ordered, the order shall, except when it is based on facts or conclusions established at a judicial trial, or when the officer concerned has absconded with the accusation hanging over him, be preceded by a properly recorded departmental enquiry. At such an enquiry a definite charge in writing shall be framed in respect of each offence and explained to the accused, the evidence in support of it and any evidence which he may adduce in his defence shall be recorded in his presence and his defence shall be taken down in writing. Each of the charges framed shall be discussed and a finding shall be recorded on each charge.

"XV. A Local Government may delegate to any subordinate authority, subject to such conditions, if any, as it may prescribe, any of the powers conferred by rule XIII. in regard to officers of the subordinate services.

"XVI. Every officer against whom an order may be passed under rules X., XIII. and XV., and who thinks himself wronged thereby shall be entitled to prefer at least one appeal against such order.

"XXVIII. The Secretary of State may call for any appeal withheld by the Local Government or the Government of India which under the rules may be made to him and may pass such orders as he considers fit; the Governor-General in Council may send for an appeal withheld by the Local Government which under the rules may be made to him, and may pass such orders as he considers fit."

The respondent's written statement alleged that r. XIV. was substantially complied with, and also raised questions of law as to the right of dismissal at pleasure and as to the suit not being maintainable. The matter first came before Beasley J. who treated it as coming before him on a preliminary issue which assumed that no inquiry in accordance with r. XIV. had in fact been held. Thinking quite rightly that the questions of law were of the greatest importance

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the learned judge referred the matter to the Full Bench. When the case came on before the Full Bench the defendant's counsel said that he was prepared to prove that an inquiry had been held which complied substantially with the provisions of r. XIV., and asked for an opportunity of establishing that defence. This was granted, and the case was sent back and was heard by Waller J. He took the evidence and after so doing found as follows: " There was, it is true, some sort of enquiry, but it was most certainly not of the sort prescribed by the rule. I say nothing about the omission to frame a charge; it being clear that the plaintiff knew perfectly well what the charge against him was; but in every other respect the enquiry was defective. Witnesses were examined but not in the presence of the plaintiff and he seems to have been dismissed mainly on the strength of a written statement made by one Sitaramayya not in his presence. I find that the requirements of rule XIV. were not satisfied."

The learned judge decided the questions of law against the appellant and dismissed the suit, but decided that in the circumstances the costs should be borne by the defendant. The appeal against this decision was heard at the same time as the appeal in *Rangachari's* case (No. 1 of 1931), in which their Lordships have just pronounced judgment. The Court, consisting of the Chief Justice and Bardswell J., agreed with the Court below on the question of fact saying that the procedure prescribed by the rule was not followed at all. But as they also agreed with the Court below on the questions of law they dismissed the appeal.

On the issue of fact which was expressly raised by the defendant their Lordships think that the findings of the Courts below were abundantly justified and were indeed inevitable. A most definite and salutary rule was disregarded in most essential respects, and the contention which was in effect that what was done was " well enough " is a contention mischievous in tendency and ill-founded in fact. An excuse was made that the procedure prescribed was not followed because there was no power to compel the attendance of witnesses not in government service. This excuse was not accompanied by any allegation or proof that an attempt to secure the attendance of such witnesses was made and that the attempt had failed.

Their Lordships now pass to consider the questions of law raised in the appeal. The contention for the appellant was and is that the statute gives him a right enforceable by action to hold his office in accordance with the rules, and that he could only be dismissed as provided by the rules and in accordance with the procedure prescribed thereby. The respondent's contention, and the decision of the Courts below, is that there is no such actionable right conferred by the statute.

There are two decisions of this Board much discussed in the Courts below which state the principles to be applied to cases such as this. The first is *Shenton* v. *Smith* (1), relied upon by the respondent, and the other is *Gould* v. *Stuart* (2), relied upon for the appellant. In the first case Dr. Smith held office in the government medical service in Western Australia and relied upon certain rules and regulations of the service as an essential part of his contract of service. He was dismissed, and brought an action for damages which failed. Upon appeal to Her Majesty in Council, Lord Hobhouse, in giving their Lordships' judgment, said (3): "It appears to their Lordships that the proper grounds of decision in this case have been expressed by Stone J. in the Full Court. They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but by an appeal of an official or political kind . . . . As for the regulations, their Lordships again agree with Stone J. that they are merely directions given by the Crown to the Governments of Crown Colonies for general guidance, and that they do not constitute a contract between the Crown and its servants."

(1) [1895] A. C. 229.
(2) [1896] A. C. 575.
(3) [1895] A. C. 234.

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A special case such as was contemplated in the above cited passage occurred in *Gould's* case (1), where the Board, consisting of three members, two of whom had sat in *Shenton's* case (2), held that the respondent Stuart held office in New South Wales under certain conditions expressly enacted in the body of the New South Wales Civil Service Act, 1884, and that these express provisions of the statute were "inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure." (3)

The question is: Does the present case fall into the general category defined and illustrated by *Shenton's* case (2), or the more exceptional category defined and illustrated by *Gould's* case? (1) On the facts it stands somewhere between the two cases inasmuch as here the rules are expressly and closely related to the employment by the statute itself. In these circumstances difference of judicial view in India has manifested itself. There are decisions favourable to the present appellant in *Satish Chandra Das* v. *Secretary of State for India* (4); in *J. R. Baroni* v. *Secretary of State for India in Council* (5); and to some extent also in *Bimalacharan Batabyal* v. *Trustees for the Indian Museum*. (6) On the other hand, both Courts in the present case have adopted the contrary view. In their Lordships' opinion the judgments in the Courts below express the correct view. The reasons which have led their Lordships to this conclusion may be shortly stated. Sect. 96B, in express terms states that office is held during pleasure. There is therefore no need for the implication of this term and no room for its exclusion. The argument for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far-reaching to commend itself for acceptance. The rules are manifold in number and most minute in particularity, and are all capable of change. Counsel for the appellant nevertheless contended with most logical consistency that on the appellant's contention an

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(1) [1896] A. C. 575.
(2) [1895] A. C. 229.
(3) [1896] A. C. 578.
(4) (1926) I. L. R. 54 C. 44.
(5) (1929) I. L. R. 8 R. 215.
(6) (1929) I. L. R. 57 C. 231.

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action would lie for any breach of any of these rules, as for example of the rules as to leave and pensions and very many other matters. Inconvenience is not a final consideration in a matter of construction, but it is at least worthy of consideration, and it can hardly be doubted that the suggested procedure of control by the Courts over Government in the most detailed work of managing its services would cause not merely inconvenience but confusion. There is another consideration which seems to their Lordships to be of the utmost weight. Sect. 96B and the rules make careful provision for redress of grievances by administrative process, and it is to be observed that sub-s. 5 in conclusion reaffirms the supreme authority of the Secretary of State in Council over the civil service. These considerations have irresistibly led their Lordships to the conclusion that no such right of action as is contended for by the appellant exists. It is said that this is to treat the words " subject to the rules " appearing in the section as superfluous and ineffective. Their Lordships cannot accept this view and have already referred to this matter in their judgment in *Rangachari's* case. They regard the terms of the section as containing a statutory and solemn assurance that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action, but will be regulated by rule. The provisions for appeal in the rules are made pursuant to the principle so laid down. It is obvious, therefore, that supreme care should be taken that this assurance should be carried out in the letter and in the spirit, and the very fact that government in the end is the supreme determining body makes it the more important both that the rules should be strictly adhered to and that the rights of appeal should be real rights involving consideration by another authority prepared to admit error, if error there be, and to make proper redress, if wrong has been done. Their Lordships cannot and do not doubt that these considerations are and will be ever borne in mind by the governments concerned, and the fact that there happen to have arisen for their Lordships' consideration two cases where there has been a serious and complete failure to adhere to

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important and indeed fundamental rules, does not alter this opinion. In these individual cases mistakes of a serious kind have been made and wrongs have been done which call for redress. But while thus holding on the clear facts of this case, as they now appear from the evidence, as they similarly held in *Rangachari's* case, their Lordships are unable as a matter of law to hold that redress is obtainable from the Courts by action. To give redress is the responsibility, and their Lordships can only trust will be the pleasure, of the executive government. Their Lordships in these circumstances, and taking this view of the effect of s. 96B of the statute, do not deem it necessary to discuss at length certain other grounds assigned for their conclusions by the judges in the Courts below. Their Lordships, however, deem it right to say that as at present advised they do not think that the Public Servants Inquiry Act of 1850 has any bearing on this action or upon *Rangachari's* action. These appellants do not seem to be servants falling within the scope of that Act, nor does a stipulation that the absence of an inquiry under that Act is not a bar to the removal of a servant constitute any reason why the absence of an inquiry under these rules should not be a bar to removal. The reasoning of the Courts below as to s. 32 of the Government of India Act, and its effect and bearing on these actions is another matter to which their Lordships must not be taken to give their assent. As at present advised their Lordships are not disposed to think that this section, which is a section relating to parties and procedure, has an effect to limit or bar the right of action of a person entitled to a right against the Government, which would otherwise be enforceable by action against it, merely because an identical right of action did not exist at the date when the East India Company was the body if any to be sued. If it had appeared that the plaintiff's service under the Government of India Act was not terminable at pleasure their Lordships are not prepared to say that remedy by suit against the Secretary of State in Council for a breach of the contract of service would not have been available to the plaintiff. Breach of contract by the Crown can in England be raised by petition of right. The

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fact that for a different reason—namely that service under the East India Company was at pleasure—a precisely similar suit could not have been brought against the company does not in their Lordships' view conclude the matter either under cl. 2 of s. 32 of the Act or on the reasoning of Sir Barnes Peacock in *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India.* (1)

For these reasons their Lordships will humbly advise His Majesty that this appeal, which by special leave was brought in forma pauperis, should be dismissed. There will be no order as to costs.

Solicitor for appellant : *G. K. Kannepalli.*
Solicitor for respondent : *Solicitor, India Office.*

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(1) (1861) 5 Bom. H. C. R. (Appx.) 1.

[PRIVY COUNCIL.]

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1936
Dec. 17.

FORBES . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR MANITOBA RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Manitoba—Special income tax—Imposed by Provincial Act—Two per cent. on wages—Liability of Dominion civil servant living and working in the Province—Direct taxation—Employer and employee—No conflict between Dominion and Provincial taxation legislation—Provincial Act valid—British North America Act. 1867 (30 *Vict. c.* 3), *s.* 91 (3), (8); *s.* 92 (2)—*The Special Income Tax Act*, 1933 (23 *Geo.* 5, *c.* 44 (*Manitoba*)), *s.* 2, *sub-s.* 1; *s.* 3, *sub-s.* 1; *s.* 4, *sub-ss.* 1, 2, 3; *s.* 5, *sub-ss.* 1, 2; *s.* 6, *sub-ss.* 1, 2; *s.* 7.

The appellant, a Dominion civil servant employed as a meat inspector in the Health of Animals Branch of the Dominion Department of Agriculture, was resident within the Province of Manitoba and performed his official duties there:

Held, that the Special Income Tax Act, 1933, of Manitoba, which (inter alia) imposes a tax of two per cent. on the wages of every employee in the Province, is valid Provincial legislation, and a Dominion civil servant resident in and working in the Province is taxable thereunder equally with all other employees in the Province.

The tax is a direct tax on employees in respect of that portion of their income which consists of wages, and the legislation is therefore valid under head 2 of s. 92 of the British North America Act, 1867, which enumerates " direct taxation within the Province in order to the raising of a revenue for Provincial purposes " as within the exclusive powers of Provincial Legislatures.

Dictum of Viscount Cave L.C. on " direct taxation " in *City of Halifax* v. *Fairbanks' Estate* [1928] A. C. 117, p. 125, and dictum of Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1887) 12 App. Cas. 575, p. 584—" Any person found within the Province may legally be taxed there if taxed directly "—applied.

Abbott v. *City of St. John* (1908) 40 Can. S. C. R. 597; and *Caron* v. *The King* [1924] A. C. 999, referred to.

The appellant was an " employee " within the meaning of s. 2, sub-s. 1 (*b*) and (*d*), of the Act of 1933, and the Dominion Government was his " employer " within the meaning of s. 7 of the Act, which provides that in the case of wages paid without deduction of the tax " by his employer " the employee shall forthwith pay the tax. That provision does not impose any duty on any employer outside the Province, and the comprehensive meaning of the term " employer " is free to operate. It is not ultra vires of the Provincial Legislature to provide that if

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD MAUGHAM.

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a wage-earner within the Province receives his wages from an employer outside the Province without deduction of tax, the wage-earner shall himself pay the tax, whether the outside employer is the Dominion Government or any one else.

The provisions of ss. 4, 5 and 6 of the Act, however, by which the duties of deduction, of accounting, of making returns and of keeping records are imposed upon "every employer" under penalties, do not apply to the Dominion Government.

Lastly, there is here no conflict between the Dominion and Provincial income tax legislation. Both income taxes may co-exist and be enforced without clashing, and there is therefore no room for the application of the doctrine of the "occupied field," which only applies where there is a clash between Dominion and Provincial legislation within an area common to both.

Citizens Insurance Company of Canada v. *Parsons* (1881) 7 App. Cas. 96, 108, referred to.

Judgment of the Supreme Court of Canada [1936] Can. S. C. R. 40, affirmed.

APPEAL (No. 92 of 1936), by special leave, from a judgment of the Supreme Court of Canada (January 15, 1936) affirming a judgment of the Court of Appeal of the Province of Manitoba (November 12, 1934), which judgment in turn affirmed the judgment of the County Court of Winnipeg (June 8, 1934).

The appellant, James Forbes, a Dominion civil servant employed as a meat inspector in the Health of Animals Branch of the Dominion Department of Agriculture, was throughout the material period resident within the Province of Manitoba and performed his official duties there. His remuneration was at the rate of $115.25 per month, plus five per cent. added and retained as a contribution to a superannuation fund. The Attorney-General for Manitoba, the respondent, suing on behalf of His Majesty in right of the Province, instituted an action in the County Court of Winnipeg to recover from the appellant a sum of $20.80, claiming that sum as a tax of two per cent. on the appellant's wages between May 1 and December 31, 1933, alleged to be due by him under the Special Income Tax Act, 1933 (23 Geo. 5, c. 44 (Manitoba)). The appellant had received his salary without deduction of the tax. By s. 3 of the Special Income Tax Act, 1933: "3. (1.) In addition to all other taxes to which he is liable under this or any other Act, every employee shall pay to His Majesty for the raising of a revenue for Provincial purposes a tax of two per centum upon the amount of all wages earned by or accruing due to him on or after the first day of May, 1933, which tax shall be levied and collected at the times and in the manner prescribed by this part . . . ."

The further relevant provisions of the Act appear from the judgment of the Judicial Committee.

The County Court of Winnipeg gave judgment for the plaintiff. That decision was unanimously affirmed by the Court of Appeal of Manitoba (Prendergast C.J.M., Dennistoun, Trueman, Robson and Richards JJ.A.), whose judgment was in turn affirmed by the Supreme Court of Canada (Duff C.J., Lamont and Davis JJ.; Cannon and Crocket JJ. dissenting).

The appeal is reported at [1936] Can. S. C. R. 40.

The main point in this appeal was whether or not it was within the competence of a Provincial Legislature in the Dominion of Canada to impose the tax in question under the Special Income Tax Act upon a Dominion civil servant in the Province.

1936. Dec. 3, 4. *C. E. Finkelstein* for the appellant. There are four points raised by this appeal: (1.) Whether this statute imposes direct or indirect taxation; (2.) whether the Provincial Legislature can tax a Dominion civil servant's salary—that is, a tax on salary as salary; (3.) whether under the interpretation of the statute the "employer" in the Act includes the Crown in right of the Dominion, and "employee" includes a Dominion civil servant; and (4.) whether, in view of the fact that the Dominion Parliament has previously enacted income tax legislation, the Provinces can cover the same field and enact similar legislation. There are between 2000 and 2500 Dominion civil servants in Manitoba.

On the question whether this is direct or indirect taxation, if it is indirect taxation it will be invalid, because the Province cannot enact indirect taxation: s. 92, head 2, of the British North America Act, 1867. The Province can only enact direct taxation, and if this is indirect that would dispose of the entire case, not only so far as Dominion civil servants are concerned, but so far as all wage-earners in the Province are concerned. This is not what is called an income tax Act, it is a specific tax on wages. Taxing the wage-earner on the wage he receives amounts to taxing him on his gross income : it is an odd form of taxation. If all the Provinces should tax the civil servants' salaries there is no degree to which they might not go. This is a tax, if the Act is read in its proper light, placed on the employer : he is the person who must pay it, no matter what the wording used : see s. 4 and *Provincial Treasurer of Alberta* v. *Kerr.* (1) The employer is made liable in an indirect way, and therefore it is indirect taxation, and invalid. The employer is liable to heavy penalties if he does not make the deduction and pay the tax. It is really taxation on the employer with the right to recoupment from the employee : *Attorney-General for Manitoba* v. *Attorney-General for Canada* (2) ; *Burland* v. *The King* (3) ; and *Cotton* v. *The King.* (4)

Next, there is no right in the Provincial Legislature to tax the salary as salary, and included in that is the argument that the attempted interception of the monies in the hands of the Dominion is bad. This is a tax specifically on salary, which is prohibited by s. 91, head 8, of the British North America Act. Under that head the Dominion Parliament has exclusive jurisdiction to fix the salaries of its civil servants. The Manitoba Act of 1933 enacts that the Dominion must deduct the tax and pay it over to the Province. That is beyond the power of the Provincial Legislature : it cannot order the Dominion Government to do so. The tax is a diminution of the salary. The Act orders the Dominion Government or its servant to pay to the Crown in right of the Province a portion of the salary : it cannot do that.

With regard to the question whether "employer" and "employee" includes the Dominion Government and a Dominion civil servant, it is only in cases where an employee has received these monies from an employer within the meaning of the Act that he is liable to pay. The Crown in right of the Dominion is not defined under the Act as an

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(1) [1933] A. C. 710, 719, 722.
(2) [1925] A. C. 561.
(3) [1922] 1 A. C. 215.
(4) [1914] A. C. 176.

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employer. In ss. 4, 5 and 6 of the Act the word " employer " cannot possibly mean the Crown in right of the Dominion: if it does not, can it be said that it does mean the Dominion Parliament when s. 7 is reached? All those sections, ss. 3, 4, 5, 6 and 7, must be read together. Since the appellant did not receive payment from an " employer " he is not liable. [Reference was made to *Hamilton* v. *The King*. (1)]

On the point of overlapping legislation, the Provincial Legislature could not enact any form of income tax legislation in view of the fact that the Dominion had previously drawn income tax within the domain of Dominion legislation in 1917. The Dominion having passed such legislation, any subsequent legislation passed by the Province dealing with income taxes is invalid. The question of overlapping legislation first came before this Board in *Tennant* v. *Union Bank of Canada*. (2) [Reference was also made to *Grand Trunk Railway Company of Canada* v. *Attorney-General of Canada* (3); *In re Silver Brothers, Ld.* (4); *Citizens Insurance Company of Canada* v. *Parsons* (5); and *Caron* v. *The King*. (6)] Both Parts of the Act should be read as they stand, and should be construed strictly in the appellant's favour: *Munro* v. *Commissioner of Stamp Duties*. (7)

Isaac Pitblado K.C. and *W. E. McLean* for the respondent were not called upon.

Dec. 17. The judgment of their Lordships was delivered by

LORD MACMILLAN. The Attorney-General of the Province of Manitoba, suing on behalf of His Majesty in right of the Province, seeks in these proceedings to obtain judgment against the appellant for a sum of $20.80, being tax alleged to be due by him under the Special Income Tax Act, 1933, of the Province of Manitoba.

The appellant is a civil servant of the Dominion of Canada, and holds the office of a meat inspector in the Health of Animals Branch of the Dominion Department of Agriculture.

(1) (1916) 54 Can. S. C. R. 331, 357.
(2) [1894] A. C. 31.
(3) [1907] A. C. 65, 68.
(4) [1932] A. C. 514, 520.
(5) 7 App. Cas. 96, 108.
(6) [1924] A. C. 999.
(7) [1934] A. C. 61, 68.

Throughout the material period he was resident within the Province of Manitoba and performed his official duties there. His remuneration was at the rate of $115.25 per month, plus 5 per cent. added and retained as a contribution to a superannuation fund. Payment was made to him monthly by an order on the Receiver-General of Canada at Ottawa transmitted to him from Ottawa and cashed by him in Manitoba. The sum sued for is stated to represent a tax of two per cent. on the remuneration so received by the appellant during the period from May 1 to December 31, 1933. The appellant received his salary without any deduction of tax.

The action was initiated in the county court of Winnipeg, where judgment was given against the appellant. The decision of the county court judge was unanimously affirmed by Court of Appeal of the Province of Manitoba, whose judgment in turn was upheld by a majority of the Supreme Court of Canada (Duff C.J., Lamont and Davis JJ.; Cannon and Crocket JJ. dissenting).

The grounds of defence on which the appellant relied before their Lordships were, broadly stated, that the Special Income Tax Act of 1933, so far as purporting to tax wages, and in particular the wages or salaries of Dominion civil servants, was unconstitutional and ultra vires of the Provincial Legislature, and that the statute was in any event inapplicable to the appellant as a civil servant of the Dominion of Canada. In order to deal with the arguments submitted on behalf of the appellant it is necessary to set out at length the material provisions of the enactment in question. The statute is entitled "An Act to Impose a Special Tax on Incomes." It contains two main parts, the first of which is headed "Taxation of Wages" and the second "Taxation of Income other than Wages." The following quotations are from Part I., on which the action is based :—

"3.—(1). In addition to all other taxes to which he is liable under this or any other Act, every employee shall pay to His Majesty for the raising of a revenue for provincial purposes a tax of two per centum upon the amount of all wages earned by or accruing due to him on or after the first day of May, 1933,

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which tax shall be levied and collected at the times and in the manner prescribed by this part . . . .

[Here follow certain exemptions inapplicable to the present case.]

. . . .

" 4.—(1.) Every employer at the time of payment of wages to an employee shall levy and collect the tax imposed on the employee by this part in respect of the wages of the employee earned or accruing due during the period covered by the payment, and shall deduct and retain the amount of the tax from the wages payable to the employee, and shall, on or before the 15th day of the month next following that in which the payment of wages takes place, or at such other time as the regulations prescribe, pay to the administrator the full amount of the tax. No employee shall have any right of action against his employer in respect of any moneys deducted from his wages and paid over to the administrator by the employer in compliance or intended compliance with this section.

" (2.) Every employer shall, with each payment made by him to the administrator under this section, furnish to the administrator a return showing all taxes imposed by this part on the employees of the employer in respect of wages during the period covered by the return, which shall be in the form and verified in the manner prescribed by the administrator.

" (3.) Every employer who deducts or retains the amount of any tax under this part from the wages of his employee shall be deemed to hold the same in trust for His Majesty and for the payment over of the same in the manner and at the time provided under this part.

" 5.—(1.) Every employer shall keep at some place in the province, of the location of which he shall inform the administrator when requested to do so, a true and correct record of the names and residential addresses of all his employees, and of the dates upon which each of them worked, the wages paid to each, and such other matters as the administrator requires.

" (2.) Every employer shall, on request of the administrator

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or any person authorised by him in writing, produce for inspection all records kept by the employer relating to his employees.

" 6.—(1.) If an employer, in violation of the provisions of this part fail to collect and pay over any tax imposed by this part, the administrator may demand and collect from him as a penalty ten per cent. of the tax payable, and he shall in addition be liable to a fine of 10 dollars for each day of default, but not to more than 200 dollars.

" (2.) Every person, who contravenes any provision of this part in respect of which no penalty is otherwise provided, shall be liable to a fine not exceeding 500 dollars, and each day's continuance of the act or default out of which the offence arises shall constitute a separate offence; but nothing contained in this section nor the enforcement of any penalty thereunder shall suspend or affect any remedy for the recovery of any tax payable under this part or of any moneys in the hands of an employer belonging to His Majesty.

" 7. In case the wages earned or accruing due to an employee are paid to him without the tax imposed thereon being deducted therefrom by his employer, it shall be the duty of the employee to forthwith pay the tax, and all the provisions of sections 23, 23A, 24 and 25 of 'The Income Tax Act' shall, mutatis mutandis, apply to the collection and recovery of the tax so imposed from the employer and employee, or either of them."

Sect. 2, sub-s. 1, of the Act provides the following interpretations:—

" (*b*) 'Employee' means any person who is in receipt of or entitled to any wages;

" (*c*) 'Employer' includes every person, manager, or representative having control or direction of or responsible, directly or indirectly, for the wages of any employee, and in case the employer resides outside the province, the person in control within the province shall be deemed to be the employer;

" (*d*) 'Wages' includes all wages, salaries, and emoluments from any source whatsoever, including—

"(i.) any compensation for labour or services, measured by time, piece, or otherwise;

"(ii.) the salaries, indemnities, or other remuneration of members of the Senate and House of Commons of the Dominion and officers thereof, members of the Provincial Legislative Councils and Assemblies, members of municipal councils, commissions, or boards of management, and of any judge of any Dominion or provincial Court, and of all persons whatsoever, whether such salaries, indemnities, or other remuneration are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person."

. . . .

Taking the contentions of the appellant in the order in which they were advanced, their Lordships deal first with his submission that the tax on wages which the Act imposes is not "direct taxation within the province in order to the raising of a revenue for provincial purposes" within the meaning of s. 92 (2) of the British North America Act, 1867, and is consequently invalid. This argument, it will be observed, would, if sustained, invalidate the tax as regards all wage-earners in Manitoba and not merely in the case of Dominion civil servants. While in the heading of this Part of the Act the tax is described as a "Tax on Wages" it would be more accurate to describe it as a tax on employees in respect of, or measured by, their wages, and indeed it is described in s. 4 as "the tax imposed on the employee by this part."

Now, all are agreed that an income tax is the most typical form of direct taxation. "The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation": per Viscount Cave L.C., in *City of Halifax* v. *Fairbanks' Estate.* (1) If, then, the tax in question is an income tax, there is an end of the matter. Prima facie the tax is an income tax. The statute imposing it is entitled "An Act to Impose a Special Tax on Incomes." It invokes the aid of provisions of the Manitoba Income Tax Act (1924

(1) [1928] A. C. 117, 125.

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C. A. c. 91 and amending Acts), and in s. 16 the Lieutenant-Governor in Council is empowered to make regulations for the joint administration of the Act and the Manitoba Income Tax Act. The Act as a whole covers all taxable income, Part I. dealing with one form of income, namely, income from wages, and Part II. dealing with income other than wages. Wages are undeniably income, and the tax is by s. 2 imposed on employees in respect of the wages earned by them. A tax is not the less a tax on income because it is imposed on a particular component of the taxpayers' income. It may be convenient to tax one part of the taxpayers' income in one way, another part in another way. Moreover, the tax is not in any way discriminatory, for it is imposed on all wage-earners indiscriminately.

To all this the appellant answers that while the statute may profess to charge the tax on the wage-earner in respect of his wages, it enacts that it is to " be levied and collected . . . . in the manner prescribed by this part," and the manner prescribed is that the employer is to deduct the amount of the tax from the wages which he pays to his employees and account for it to the Crown. The tax, he says, is thus really imposed on the employer; it is not a tax on any income which the employee receives, but a tax on the wage fund in the hands of the employer, and the tax is thus only indirectly imposed on the employee. Their Lordships cannot accept this argument. In their view s. 3 is what it professes to be, a section charging the tax on the employee. The following sections which provide for the deduction of the amount of the tax by the employer before he pays over his employee's wages are mere machinery, and machinery of a very familiar type in income tax legislation. The expedient of requiring deduction of tax at the source, as it is called, is one which has long been in effective use in the United Kingdom. A taxpayer is said either to pay or to bear income tax according as he pays it himself or suffers deduction of it from moneys due to him, but in either case he is the taxpayer and on him the burden of the tax is imposed. In their Lordships' opinion the present tax is a direct tax on

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employees in respect of that portion of their income which consists of wages.

The appellant's second contention was that it is incompetent for the Provincial Legislature to tax the income of a Dominion civil servant? Why so? "Any person found within the province may legally be taxed there if taxed directly": per Lord Hobhouse in *Bank of Toronto* v. *Lambe.* (1) The appellant's argument is that the tax offends against the exclusive legislative authority of the Dominion Parliament in "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada" under s. 91 (8) of the British North America Act. If, he says, the Provincial authorities can tax at the rate of two per cent. the salary which he receives from the Dominion to enable him to live in the Province and discharge his duties there, they can tax his salary to such an extent as to render it impossible for him to live and perform his duties. A similar argument in terrorem was advanced and rejected in the case of the *Bank of Toronto* v. *Lambe* (2): "It is suggested," says Lord Hobhouse, "that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes."

The validity of imposing direct taxation by provincial legislation on a Dominion official has been expressly established by authority in the case of *Abbott* v. *City of St. John* (3), which was approved by this Board in *Caron* v. *The King.* (4) Lord Phillimore, in delivering the judgment of the Board, quoted this passage from the judgment of Davies J. in *Abbott's* case (5): "The Province does not attempt to interfere directly

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(1) 12 App. Cas. 575, 584.
(2) Ibid. 586.
(3) (1908) 40 Can. S. C. R. 597.
(4) [1924] A. C. 999.
(5) Ibid. 1005.

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with the exercise of the Dominion power, but merely says that, when exercised, the recipients of the salaries shall be amenable to provincial legislation in like manner as all other residents." Dealing with the suggestion that provincial taxation might paralyse the Dominion civil service, Davies J. adds that (1) "if, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted, it would be then time enough to consider the question and not to assume beforehand such a suggested misuse of the power." It should, perhaps, be explained that in *Caron's* case (2) the validity of the Dominion Income War Tax Act, 1917, as affecting the salary of a minister of a Provincial Government, was upheld. The present case is the converse. In their Lordships' opinion the appellant's second contention must share the fate of the first.

Next, the appellant submits that he is not an "employee" at all within the meaning of the Act, and, further, that the Dominion is not his employer. Cannon J., in the distressing picture which he draws of the civil servant's lot, seems to share this view. It is not, however, the view of the Dominion Legislature, which in the Civil Service Act, 1927, R. S. C. c. 22, uses the word "employees" in speaking of civil servants, and indeed in s. 2 interprets "employees" to mean and include "officers, clerks and employees in the civil service." But the Act is quite explicit, and the appellant clearly falls within the definition of "employee" in s. 2, sub-s. 1 (*b*), for he "is in receipt of . . . . wages" and "wages" by s. 2, sub-s. 1 (*d*), include "all wages, salaries, and emoluments from any source whatsoever," and in particular "(ii.) the salaries . . . . of all persons whatsoever, whether such salaries . . . . are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person." To this there can really be no answer. The appellant, however, seeks to extricate himself by arguing that even if he is an employee, the Dominion Government is not his employer within the meaning of the Act. If the Dominion is his employer the combined effect of s. 3 of the Act imposing the

(1) [1924] A. C. 1005.

(2) [1924] A. C. 999.

tax on him as an employee and s. 7 requiring him " to forthwith pay the tax " if his wages are paid to him " without the tax imposed thereon being deducted therefrom by his employer "—which is the case with the appellant—leads inevitably to judgment against him. If the Dominion is not his employer, then he maintains that the condition of the tax not having been deducted by his employer has not been fulfilled, and he escapes from the conditional obligation to pay imposed by s. 7.

In support of the submission that the Dominion is not an " employer " within the meaning of the Act, the appellant refers to ss. 4, 5 and 6 of the Act, where the duties of deduction, of accounting, of making returns and of keeping records are imposed upon " every employer " under penalties. This cannot, he says, apply to the Dominion, for it would be ultra vires of the Provincial Legislature to impose duties and corresponding penalties on the Dominion Government ; if the Provincial Legislature has done so, the legislation is invalid. Their Lordships agree that in these sections the term " employer " does not on a sound construction apply to the Dominion Government. But equally it does not apply to all other employers outside the Province. And this for the very good reason that the revenue laws of a country are addressed to the inhabitants of that country and are ineffectual to reach or affect persons beyond its borders. Indeed, " it may be accepted as a general principle that States can legislate effectively only for their own territories ": *Croft* v. *Dunphy*. (1) Therefore, when a revenue statute of Manitoba addresses " every employer " and requires him under penalties to discharge certain duties in relation to the collection of the revenue of the Province, the order must be construed as addressed to " every employer " who is subject to the Legislature, and is inapplicable to employers beyond its jurisdiction, notwithstanding that the language in which the term " employer " is defined in the Act is sufficiently wide to include persons beyond its jurisdiction. On the other hand, their Lordships are equally clear that there is no such obstacle in the way of construing the word

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(1) [1933] A. C. 156, 162.

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" employer " where it occurs in s. 7 in the phrase " without the tax imposed thereon being deducted therefrom by his employer " as including the Dominion Government or any other employer outside Manitoba. The comprehensive meaning of the term " employer " is here free to operate, for the provision in question does not seek to impose any duty on persons outside the Province ; it merely refers to a question of fact, the fact of the employer, wherever or whoever he may be, not having deducted the tax in paying wages to a person within the Province. It is not ultra vires of the Provincial Legislature to provide that if a wage-earner within the Province receives his wages from an employer outside the Province without deduction of tax, the wage-earner shall himself pay the tax, whether the outside employer be the Dominion Government or any one else. Such legislation is not legislation affecting persons outside the Province with any duty or liability.

The last ground on which the appellant took his stand is even less tenable. He submitted that the Dominion Parliament by enacting a general Dominion Income Tax in 1917 had already so occupied the field of this form of taxation as to preclude the Manitoba Legislature from enacting any income tax legislation. In their Lordships' opinion this submission, which, if well-founded, would invalidate the whole Act and not merely Part I., is based on a misconception of the doctrine of the " occupied field " evolved in the interpretation of the British North America Act. The Dominion Parliament has exclusive authority under s. 91 (3) to make laws for " the raising of money by any mode or system of taxation," and each Province under s. 92 (2) has the exclusive right to make laws for " direct taxation within the Province in order to the raising of a revenue for provincial purposes." It was pointed out in *Citizens Insurance Company of Canada* v. *Parsons* (1) that though the description " the raising of money by any mode or system of taxation " is " sufficiently large and general to include ' direct taxation within the province in order to the raising of a revenue for provincial purposes ' assigned to the provincial legislatures by s. 92, it obviously could not have been intended that . . . . the general power should override the particular one." (1) This statement is quoted and approved in *Bank of Toronto* v. *Lambe.* (2) The doctrine of the "occupied field" applies only where there is a clash between Dominion legislation and provincial legislation within an area common to both. Here there is no conflict. Both income taxes may co-exist and be enforced without clashing. The Dominion reaps part of the field of the Manitoba citizen's income. The Province reaps another part of it. This argument therefore also fails.

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(1) 7 App. Cas. 96.

Their Lordships have now disposed adversely to the appellant of all the grounds on which the validity of the tax in question was challenged before them, and they will accordingly humbly advise His Majesty that the appeal be dismissed. As their Lordships were informed that it had been agreed between the parties that they should each bear their own costs throughout these proceedings there will be no order as to costs.

Solicitors for appellant : *Herbert Smith & Co.*
Solicitors for respondent : *Blake & Redden.*

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(1) 7 App. Cas. 108.

(2) 12 App. Cas. 575, 585.

[HOUSE OF LORDS.]

H. L. (E.)*
1936
Nov. 17.

THE LORD MAYOR, ALDERMEN AND CITIZENS OF THE CITY AND COUNTY OF NEWCASTLE-UPON-TYNE AND THE MAYOR, ALDERMEN AND BURGESSES OF THE COUNTY BOROUGH OF GATESHEAD . . . . APPELLANTS;

AND

THE RAILWAY ASSESSMENT AUTHORITY AND THE LONDON AND NORTH EASTERN RAILWAY COMPANY . . . . RESPONDENTS.

Rating—Railway—Bridge—Upper deck for railway—Lower deck for vehicles and foot passengers—Railway hereditament—Newcastle-upon-Tyne and Berwick Railway Act, 1845 (8 *&* 9 *Vict. c. clxiii.*), *s.* 23—*Railways* (*Valuation for Rating*) *Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 24), *s.* 1, *sub-s.* 3.

By s. 23 of the Newcastle-upon-Tyne and Berwick Railway Act, 1845, the predecessors of a railway company were authorized and required " to construct and maintain across the river Tyne a bridge which was to be available not only for the purpose of carrying the said railway across the said river, but also for providing a roadway for the passage of passengers, horses, cattle and carriages across the said river." The bridge as constructed consisted of an upper deck carrying the railway and a lower deck carrying a roadway for the use of which the Company took tolls. The tolls formed part of the general revenue of the Company:—

Held, that the lower deck was part of the undertaking of the Company, either originally, or as being a " subsidiary or ancillary undertaking carried on by the Company," and, being occupied for the purposes of that undertaking, was a railway hereditament within the meaning of s. 1, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930, and rateable by the Railway Assessment Authority and not by the general law.

APPEAL from an order of the Court of the Railway and Canal Commission. (1)

The question was whether a hereditament occupied by the

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* *Present:* LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, and LORD MAUGHAM.

(1) [1936] 1 K. B. 253.

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London and North Eastern Railway Company, who were respondents to the appeal, ought to be entered in the first Railway Valuation Roll as a railway hereditament.

By s. 1, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930, " 'Railway hereditament' means," with certain immaterial exceptions, "any hereditament occupied for the purposes of the undertaking of a railway company," and " 'Undertaking' . . . . includes . . . . (*b*) any subsidiary or ancillary undertaking carried on by the company, not being a road-transport, sea-transport or air-transport undertaking." . . . .

The hereditament was a bridge consisting of an upper deck carrying the railway, and a lower deck carrying a roadway, with a toll house at each end of the lower deck to enable the Railway Company to collect tolls from passengers using the lower deck. The tolls so taken went to increase the general revenue of the whole undertaking of the Railway Company.

The bridge was constructed in pursuance of s. 23 of the Newcastle-upon-Tyne and Berwick Railway Act, 1845, which required the Company "to construct and maintain a bridge across the river Tyne" and so to "construct the said bridge as that the same" should "be available not only for the purpose of carrying the said railway across the said river, but also for providing a roadway for the passage of passengers, horses, cattle and carriages across the said river." The northern half of the bridge is in Newcastle-upon-Tyne and the southern half is in Gateshead.

The Railway Assessment Authority in the draft Valuation Roll entered the lower deck in section B as a railway hereditament, and in division III. of that section as a freight transport hereditament. The Newcastle Corporation and the Gateshead Corporation thereupon made representations to the Railway Assessment Authority that the lower deck was not a railway hereditament or part of a railway hereditament and ought to be excluded altogether from the Valuation Roll. The Railway Assessment Authority then gave notice to the Corporations that they had included the lower deck in section B as a railway hereditament, but in division I. of that section as a hereditament other than an industrial and freight transport hereditament.

The Corporations appealed to the Court of the Railway and Canal Commission and contended that the lower deck was not a railway hereditament within the meaning of s. 1 of the Railways (Valuation for Rating) Act, 1930, but was a road bridge and was not occupied by them for the purposes of the undertaking of a railway company. The Court dismissed the appeal on the ground that the lower deck was occupied by the Railway Company as part of their statutory undertaking and therefore for the purposes of their undertaking of a railway company.

The Corporations appealed to this House.

1936. Nov. 13. *F. J. Wrottesley K.C.* and *J. Charlesworth* for the appellants. A highway is prima facie no part of a railway undertaking; and certainly the statute under which the bridge in question was constructed contains nothing to suggest that the lower deck was in any way "subsidiary or ancillary" to the railway. The bridge was provided not only for the purpose of carrying the railway across the river but also with the separate and distinct object of supplying a roadway for the passage of passengers, horses, cattle and carriages across the river. The two purposes are in opposition one to the other, and the undertakings, so far from being allied, are competitive.

Nov. 16. *Erskine Simes* for the Railway Assessment Committee.

Walter Monckton K.C., *A. M. Trustram Eve K.C.*, and *Alfred Tylor* for the London and North Eastern Railway Company. As a condition of carrying their railway over the River Tyne the predecessors of the respondents, the London and North Eastern Railway Company, were required by Act of Parliament so to construct the bridge as that it should be available for the benefit of passengers, horses, cattle and carriages, and were enabled to take tolls, which in fact contribute to their general receipts. In these circumstances it cannot be validly contended that the lower deck is not a "subsidiary or ancillary undertaking carried on by the company" within the meaning of s. 1, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930.

Wrottesley K.C. replied.

The House took time for consideration.

Nov. 17. LORD BLANESBURGH. My Lords, the question which upon this appeal your Lordships are called upon to determine is whether the lower deck of the high level bridge spanning the River Tyne between Newcastle and Gateshead, consisting of a roadway, for the use of which tolls are chargeable and are charged by the respondents, the London and North Eastern Railway Company, to whom the whole bridge belongs, is or forms together with the toll houses thereon a railway hereditament or part of a railway hereditament within the meaning of s. 1 of the Railways (Valuation for Rating) Act, 1930.

The respondents, the Railway Assessment Authority—I will refer to them in what follows as "the Authority"—are the body charged by that Act with the duty (amongst other things) of apportioning amongst all the railway hereditaments in England occupied by a railway company to which, like the respondent Company, the Act applies, the net annual value of the Company's undertaking as a whole in so far as it is carried on in England. It is necessary for the Authority in performing that duty to determine whether any hereditament is a railway hereditament as defined in the section referred to. And the lower deck of the high level bridge referred to, the Authority has determined to be such a hereditament. That determination, however, was challenged by the appellants, the Corporation of Newcastle and the Corporation of Gateshead, the respective rating authorities within whose rating areas the high level bridge is situate, and these Corporations, aggrieved by the finding of the Authority, duly appealed against it to the Court of the Railway and Canal Commission. These Commissioners, agreeing with the Authority, dismissed the appeal, and against their order of dismissal the present appeal is brought.

It will be convenient before adverting to the section of the Act of 1930, upon which the question at issue ultimately depends, to make some inquiry into the origin of the bridge in question. It was constructed by the Newcastle and Berwick Railway Company in pursuance of the Newcastle-upon-Tyne and Berwick Railway Act, 1845. That Company was a predecessor of the respondent Company, the London and North Eastern Railway Company.

Sundry provisions of the Act of 1845 invite attention. It may be useful, for example, to note the sense in which the words "the undertaking" are there used. This appears from s. 1 of the Act, which incorporates the Companies Clauses Act, 1845, the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845. These incorporated Acts contain the following definitions of the expression "the undertaking"; I take them from the printed Case of the respondents, the London and North Eastern Railway Company: (*a*) Sect. 2 of the Companies Clauses Act, 1845, provides that "the expression 'the undertaking' shall mean the undertaking or works, of whatever nature, which shall by the Special Act be authorized to be executed." (*b*) Sect. 2 of the Lands Clauses Consolidation Act, 1845, provides that "the expression 'the works' or 'the undertaking' shall mean the works or undertaking, of whatever nature, which shall by the special Act be authorized to be executed." (*c*) Sect. 2 of the Railways Clauses Consolidation Act, 1845, provides that "the expression 'the undertaking' shall mean the railway and works, of whatever description, by the special Act authorized to be executed."

The bridge itself is first referred to in s. 20 of the special Act; by that section the Newcastle and Berwick Railway Company were authorized to make certain other railways, including a railway passing across the River Tyne by means of a bridge. Sect. 23, so far as it is material, provides: "That for the purpose of carrying the said Railway across the river Tyne it shall be lawful for the said Company and they are hereby required to construct and maintain a bridge across the river Tyne, with such piers, abutments, approaches and other

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works as may be necessary for the purposes thereof" ; and then, after some intervening words which are not for this purpose material, the section goes on : "and the said Company shall so construct the said bridge as that the same shall be available not only for the purpose of carrying the said railway across the said river, but also for providing a roadway for the passage of passengers, horses, cattle, and carriages across the said river."

Then s. 26 of the Act—again so far as is material—provides : "That the Company hereby incorporated shall commence the works of the said bridge by this Act authorized to be made within nine months after the passing of this Act and shall proceed with such works with all reasonable despatch ; . . . . and in case the said bridge and roadway shall not be completed and open for the passage, not only of the said railway, but also of passengers, horses, cattle, and carriages, within four years after the passing of this Act, it shall be lawful for the Mayor, Aldermen, and Burgesses of the Borough of Newcastle-upon-Tyne, and for the Mayor, Aldermen, and Burgesses of the Borough of Gateshead, in case they shall see fit, to complete the said bridge, and to recover from time to time against the said Company in a summary way . . . . all and every such sum and sums of money as they shall expend in the completion of the said bridge."

Then by s. 37 of the same Act the Company was authorized to demand and take in respect of all passengers, animals and carriages which should pass along or across such part of the bridge as might be appropriated for a roadway any tolls or sums not exceeding those in s. 37 specified.

Now, whatever may be said about the Act of 1930 as applied to the bridge now in question, there can, I think, be no doubt that under that Act of 1845 the roadway which the Company thereby incorporated was required to construct, with the tolls the Company was authorized to levy, was an integral part of the railway undertaking thereby authorized. The railway bridge was by the Act authorized only on the terms that a roadway for the public benefit was constructed as part of it. The tolls which the Company was authorized to levy in respect of that roadway, while a return for the public service rendered, went to increase the general revenue of the Company's whole undertaking.

The Company was left at liberty under that Act to incorporate the roadway in the railway bridge as it thought fit, and the roadway which it ultimately constructed, being always, along with the railway, known as the high level bridge, is thus described in their Case by the appellants: "The bridge consists of an upper deck which is exclusively used for carrying a railway across the River Tyne and a lower deck which is exclusively used for carrying a roadway, consisting of a carriageway in the centre and two footpaths, one on each side of the carriageway. At each end of the lower or road deck is a toll house to enable the Railway Company, in exercise of their statutory powers in that behalf, to collect tolls from persons and vehicles crossing the said River by the lower or road deck. . . . The bridge is as to its northern half in Newcastle-upon-Tyne and as to its southern half in Gateshead. In Newcastle-upon-Tyne, from 1850 onwards, the halves of the upper and lower decks situate in Newcastle-upon-Tyne have been assessed as separate hereditaments. In Gateshead, until 1925, the half of the bridge situate in Gateshead was assessed as one hereditament, but from 1925 onwards the upper and lower decks were separately assessed. As from the 1st October, 1929, ... in both Newcastle-upon-Tyne and Gateshead the upper deck (which carried the railway) was inserted in the special list as a freight transport hereditament. In both Newcastle-upon-Tyne and Gateshead the assessment of the lower deck (which carried the roadway) remained unaltered."

With this preface, we may now come to the Act of 1930. With regard to it, I need not detain your Lordships by any description of the somewhat elaborate procedure, which here in the result ended in the published pronouncement of the Authority already indicated—namely, that while they regarded the upper and lower decks of the bridge as separate hereditaments they treated both as a railway hereditament or hereditaments or as a part or parts thereof; each deck, in other words, and not the upper deck only, being in their judgment a hereditament within the purview of the Act of 1930.

Against this, pursuant to s. 9, sub-s. 2, of that Act, the two Corporations filed applications by way of appeal to the Commissioners on the ground (amongst others) that the lower deck of the bridge had been incorrectly treated by the Authority as a railway hereditament or part of one. And that is now the only question for your Lordships' decision.

It turns upon the true effect of s. 1, sub-s. 3, of the Act of 1930. That sub-section is as follows: "For the purposes of this Act 'Railway Company' means (except in the First Schedule to this Act) a railway company to which this Act for the time being applies; 'Undertaking' in relation to a railway company includes, in addition to the principal undertaking of the company (*a*) any canal, dock or harbour undertaking carried on by the company; (*b*) any subsidiary or ancillary undertaking carried on by the company, not being a road-transport, sea-transport or air-transport undertaking; and (*c*) the share of the company in any joint undertaking carried on by, or on behalf of, two or more railway companies not being a road-transport, sea-transport or air-transport undertaking; but, save as aforesaid, does not include the share of the company in any joint undertaking; 'Railway hereditament' means, subject as hereinafter provided, any hereditament occupied for the purposes of the undertaking of a railway company; Provided that no premises occupied as a dwelling-house, hotel or place of public refreshment, or so let out as to be capable of separate assessment, shall be deemed to be, or to form part of, a railway hereditament."

Now, my Lords, I agree with MacKinnon J., who has analysed this definition clause with great fulness, that the expression "railway hereditament," no less than the word "undertaking" in connection with which it has to be read, is in this section an expression of the widest content. In its application to what I may call the roadway here it is, I think, difficult, with the Act of 1845 in mind, to reach any conclusion other than that the roadway is part of the "principal undertaking" of the Company and is a hereditament occupied for the purpose of that undertaking in the fullest sense of that word. And if objection be taken to that construction which as it seems to me best accords with the provisions of the section as a whole, then I am prepared to hold that the roadway undertaking is an undertaking "subsidiary or ancillary" to the "principal" or railway undertaking of the respondent Company. The provisions of the special Act of 1845 again, as I think, point to that conclusion. But it may be reached without assistance from that statute. It was suggested for the appellants that this roadway undertaking was in the nature of a competitive rather than an ancillary or subsidiary undertaking, and a neighbouring toll bridge over the Tyne was instanced as being competitive with the high level bridge. And so may such a bridge well be when in other hands, as your Lordships were told the neighbouring bridge was. But if you find that such a bridge in other hands is competitive, you go, I think, a long way towards showing that in the same hands it might become either ancillary or subsidiary.

My Lords, I do not further explore the case, although there was much in Mr. Wrottesley's argument that invites further comment. In my judgment, however the problem be regarded, the concurrent solution of the Authority and the Commissioners is correct, and this appeal should, I think, be dismissed with costs.

And I move your Lordships accordingly.

LORD RUSSELL OF KILLOWEN. My Lords, I agree. If (as was the case here in regard to the predecessor in title of the London and North Eastern Railway Company) a company is given statutory authority to carry on a railway undertaking on condition that it shall make, maintain and carry on a toll-bearing road deck as part of a bridge which is to carry its railway across a river, then in my opinion it maintains and carries on that road deck either as an incidental and necessary part of its principal undertaking or as an undertaking

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subsidiary to its principal undertaking. On either view, the road deck now in question is a hereditament occupied for the purpose of the undertaking of the London and North Eastern Railway Company within the meaning of the word "undertaking" as stated in the Railways (Valuation for Rating) Act, 1930. The road deck is therefore a railway hereditament within the definition contained in s. 1 of that Act. The road deck was accordingly properly included in the Valuation Roll, and this appeal must fail.

LORD MAUGHAM. My Lords, I am of the same opinion. The appeal depends upon the true construction of s. 1 of the Railways (Valuation for Rating) Act, 1930. The question is whether the word "undertaking" in relation to the London and North Eastern Railway Company includes the whole of the high level bridge which spans the River Tyne. Along the upper deck of the bridge the railway is carried. Does the undertaking of the Company include the lower deck along which there is a roadway for the use of foot passengers and carriages, and for which tolls are charged? There are, I think, two factors in the case which must lead us to an affirmative conclusion. Firstly the Railway Company not only was empowered but was required so to construct the bridge "as that the same shall be available not only for the purpose of carrying the said railway across the said river, but also for providing a roadway for the passage of passengers, horses, cattle, and carriages across the said river." I am here quoting the final words of s. 23 of the Newcastle and Berwick Railway Act, 1845, the section by which the Railway Company was authorized and required to construct the bridge across the Tyne. The second factor is that the lower deck is structurally so connected with the upper deck that no physical separation is possible. In London a not bad illustration of a bridge holding the same position is the case of Hungerford Bridge. Would any ordinary person who was acquainted with and who used that bridge have any doubt that it formed part of the railway undertaking of the present Southern Railway?

My Lords, that is sufficient to dispose of the present appeal;

but I think it right to add that if I were in doubt on that point I should be of opinion that the road bridge was a "subsidiary undertaking" within the meaning of the section under consideration. The main argument against that view presented by Mr. Wrottesley in his ingenious address was that if so the Legislature might have used the word "other" instead of using the words "subsidiary or ancillary." My Lords, the fact that two long words are used by the Legislature where one shorter word would do is a very unsafe guide to the construction of the statute. The contention certainly does not constrain us to hold that the word "subsidiary" has precisely the same meaning as the word "ancillary." For my part, I see no reason for thinking that the word is used in any special or limited sense. Its ordinary meaning, in the context which we have here, is "subordinate or secondary to the main or principal undertaking," and in my opinion it has that signification in s. 1.

My Lords, I agree with the motion that has been proposed and with the reasons which your Lordships have given in support of it.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, Nov. 17, 1936.

Solicitors for appellants: *Collyer-Bristow & Co., for Sir A. M. Oliver, Town Clerk, Newcastle-upon-Tyne.*

Solicitors for the respondents the Railway Assessment Committee: *Torr & Co.*

Solicitor for the respondents the London and North Eastern Railway Company: *I. B. Pritchard.*

Dictum of Lord Russell of Killowen, at p. 299, *applied*. Haldane v. Eckford. [1948] 2 All E.R. 622.

Applied. Haldane *v.* Eckford. 1948 Ch. 664

Distinguished. Comr. of Stamp Duties of N.S.W. *v.* Way [1952] A.C. 95

[HOUSE OF LORDS.]

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REGINALD JOHN BURRELL AND THE HONOURABLE PATRICK KINNAIRD . . . . APPELLANTS;

AND

HIS MAJESTY'S ATTORNEY-GENERAL, ON BEHALF OF HIS MAJESTY. . . . . RESPONDENT.

Revenue—Estate Duty—Settled estate—Discretionary trusts in favour of a class—Change in members of class—New class—Death of beneficiary—Property "passing" or "deemed to pass"—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 7.

A testator devised all his real property to trustees in fee simple upon trust in their absolute discretion to pay a yearly allowance of such amount as the trustees should think fit to his son H. for life or to pay or apply the same for the benefit of H. or his wife or children or other specified persons and after the death of H. in trust for the first and other sons of H. successively in tail male; and in default of such issue to pay to his son R. during his life a similar yearly allowance and after the death of R. in trust for the first and other sons of R. successively in tail male; and in default of such issue as therein directed. The will contained a proviso that if any equitable tenant in tail should be born in the testator's lifetime the interest of such person should be excised from the will, and the trustees should hold the property in trust to pay him a yearly allowance of such amount from time to time as they should in their uncontrollable discretion think fit, and after his death in trust for his first and other sons in tail male. After certain other dispositions the will devised the property in ultimate remainder to the testator's right heirs. Each beneficiary who should be entitled to an allowance was given power to appoint a jointure to his wife and to charge the property with portions for his children.

During the life of H. the persons who were beneficially interested in the discretionary trusts were H. himself, his wife, his sons W. and M. and his daughter G. After the death of H. the persons beneficially interested in the trust were W., his wife and his brother M.:—

Held, that on the death of H. the title to the beneficial interest in the property passed under s. 1 of the Finance Act, 1894, from the first named group of persons to the secondly named group, notwithstanding that certain persons were members of both groups.

* *Present:* Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, and Lord Roche.

APPEAL from an order of the Court of Appeal dismissing an appeal from an order of Finlay J. made on the hearing of an information by the Attorney-General praying a declaration that upon the death of Harry Charles John Alston-Roberts-West (hereinafter called "the deceased"), on November 1, 1931, estate duty became payable in respect of certain property subject to the trusts of the will of his father James Alston-Roberts-West (hereinafter called "the testator"), who died on June 15, 1918.

By his will, dated May 30, 1912, the testator appointed certain persons executors and trustees thereof and after making certain bequests—

(1.) devised all his real estate to trustees upon trust out of the net rents and profits to pay to the deceased during his life a yearly allowance of such amount from time to time as they should in their discretion think fit, and after his death in trust for his first and other sons successively in tail male :—

(2.) declared that if any person who under the foregoing trusts should be an equitable tenant in tail male by purchase should be born in the testator's lifetime the interest thereinbefore conferred on such person should be excised from his will and in place thereof the trustees should hold the said real estate and the net rents and profits thereof in trust out of the said rents and profits to pay to such person during his life a yearly allowance of such amount from time to time and by such instalments as they should in their discretion think fit, and after his death for his first and other sons successively in tail male :—

(3.) declared that it should be lawful for his trustees instead of paying any such allowance to the person who under the foregoing provisions would be entitled to receive the same, to apply the same for his benefit or for the benefit of any wife or child or remoter issue of his or for the benefit of any person who if he were dead would be entitled to receive the net rents and profits of the said real estate or any allowance thereout or for the benefit of any two or more of such several objects as the trustees might in their discretion think fit:

(4.) directed that any balance of the net rents and profits arising from his real estate during the life of any person entitled to receive an allowance under the foregoing provisions over and above what might be applied in payment of any of the said allowances should be applied to the reduction of capital charges affecting the said real estate but save as aforesaid the testator made no disposition concerning the balance:

(5.) empowered each person who under the foregoing provisions should become actually entitled to an allowance (with an immaterial exception) to appoint a jointure not exceeding 1000*l.* per annum to his widow and to charge portions for his children (other than a son becoming entitled as tenant in tail or to an allowance under the foregoing provisions) not exceeding 10,000*l.* in all:—

(6.) bequeathed his residuary personal estate to his trustees upon trust to sell the same and to invest the proceeds of the sale and his ready money (after payment of debts and funeral and testamentary expenses and legacies) in the purchase of freehold lands to be settled to the uses upon the trusts and subject to the powers and provisions upon and subject to which the same would have been held if they had been purchased with capital money arising from a sale of the real estate thereinbefore devised.

By a codicil to his will the testator declared that any son of his succeeding to any beneficial interest under the will relating to his real estate should have the same only on condition that he should within three months pay to the trustees or secure to them the sum of 5000*l.* to be held by them upon the trusts declared of the net residue of the proceeds of conversion of his residuary personal estate and the income thereof.

The testator died on June 15, 1918, and his will was duly proved. He left him surviving his eldest son and heir at law (who took nothing under the will), his second son (the deceased), two other sons, the wife of the deceased by name

Olive Alston-Roberts-West, and three children of the deceased—namely, two sons, William Reginald James Alston-Roberts-West and Michael Montgomerie Alston-Roberts-West, and one daughter, Gillian Mary, wife of John Ranier Yolland, who had issue one child born shortly before the testator's death.

The deceased duly paid the sum of 5000*l.* to the trustees of the will.

By a deed dated January 20, 1927, the deceased, in exercise of the power in that behalf contained in the testator's will, appointed a jointure of 1000*l.* per annum to the said Olive Alston-Roberts-West and charged two portions of 5000*l.* each in favour of his children Michael Montgomerie and Gillian Mary Yolland.

Between the death of the testator on June 15, 1918, and the death of the deceased on November 1, 1931, the trustees of the testator's will in exercise of their discretion applied sums amounting to the whole of the net income (except a sum of about 1500*l.* left in their hands at the death of the deceased) of the testator's real estate and of his residuary personal estate, which included the 5000*l.* paid by the deceased as aforesaid, in providing the allowance payable to the deceased or applicable for his benefit as aforesaid and distributed the allowance among the deceased and his wife and three children.

The deceased left him surviving his wife Olive Alston-Roberts-West, his three children William Reginald James, Michael Montgomerie, and Gillian Mary Yolland and her daughter.

On the death of the deceased the jointure of 1000*l.* and the two portions of 5000*l.* became payable. Subject thereto the settled estate was held upon trust to pay out of the net income a yearly allowance of such an amount as the trustees in their discretion should think fit, for the benefit of William Reginald James, and the position before the death was changed to this extent—namely, that the persons eligible to participate in the allowance instead of being the deceased himself, his wife Olive Alston-Roberts-West, his sons William Reginald James and Michael Montgomerie and his daughter Gillian Mary Yolland and latterly her daughter, were now his

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sons William Reginald James and Michael Montgomerie and the wife of William.

In these circumstances the Crown claimed that either (A) the settled property passed upon the death of the deceased under s. 1 of the Finance Act, 1894 (1), or (B) the deceased and the several persons to whom or for whose benefit the trustees were authorized to make payments out of the allowance allocated by them to the deceased had an interest in the settled property extending to the whole income thereof, or alternatively extending to 70 per cent. of the whole income, being the whole income less 30 per cent. paid to or for the benefit of the two sons of the deceased; and that on his death there accrued or arose by the cesser of the interest of the deceased a benefit equal to the principal value or alternatively to 70 per cent. of the principal value of the settled property; and that in either case the benefit was liable to estate duty under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894.

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(1) Finance Act, 1894, s. 1: "In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'Estate Duty,' at the graduated rates hereinafter mentioned." . . . .

Sect. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include . . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest.

(*c*) Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to 'volunteer' were omitted therefrom."

Sect. 7, sub-s. 5: "The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased. . . . ."

Sub-s. 7: "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall—

(*a*) if the interest extended to the whole value of the property, be the principal value of that property; and

(*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

On June 13, 1934, the Attorney-General filed an English Information against the trustees of the testator's will claiming a declaration according to the contentions above stated, and consequential relief.

The case was heard by Finlay J., who held that on the death of the deceased there was a passing of the settled estate under s. 1 of the Finance Act, 1894, and that estate duty was payable upon the whole principal value of the estate.

The trustees appealed. The Court of Appeal dismissed the appeal, but were not unanimous in affirming Finlay J. Lord Hanworth M.R. and Maugham L.J. held that the duty was payable under s. 2, sub-s. 1 (*b*), and not under s. 1. Romer L.J. agreed with Finlay J. In these circumstances the Court made a declaration "that upon the death of the above-named Harry Charles John Alston-Roberts-West estate duty became payable in respect of the whole principal value of the said settled estate as property deemed to pass under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894."

The trustees appealed to this House.

1936. Oct. 22. *W. P. Spens K.C.* and *D. Ll. Jenkins* for the appellants. There was no passing of the estate of the testator or of any part thereof under s. 1 of the Finance Act, 1894. The whole estate, legal and equitable, remained throughout in the heir at law and next of kin and so they remain to the present day, except in so far as the trustees in their discretion have decided to distribute it. The Crown contend that there was a passing of property from the group of persons who might benefit under the discretionary trust before the death of the deceased to the group of persons who might benefit under the trust after the death of the deceased; but the two sons of the deceased, namely William Reginald James and Michael Montgomerie, were members of both groups. In order that property may pass under s. 1 of the Finance Act, 1894, it must pass as a whole: *Earl Cowley* v. *Inland Revenue Commissioners* (1), per Lord Macnaghten. Therefore the Crown, in order to succeed, must show that the property was deemed to pass under s. 2, sub-s. 1 (*b*). This was the view of Maugham L.J. in the Court of Appeal, and, it is submitted, is so far correct.

But in order that it may be deemed to pass, the passing must be, in the present case, from one group of beneficiaries to another, and where the same persons are members of both groups the property cannot be deemed to pass from one to the other. On the death of the deceased there was no cesser of the interests of his two sons William and Michael, which remained unaffected by that event. Those persons still remained eligible to participate in the estate at the discretion of the appellants; and it cannot be affirmed that any benefit accrued or arose to any one by any such cesser. At any rate no benefit which could be valued under s. 7, sub-s. 7, of the Finance Act, 1894, accrued or arose to the other members of the group to whom the property is, as alleged by the Crown, to be deemed to have passed.

Oct. 23. *Sir Donald Somervell A.-G.* and *J. H. Stamp* for the respondent. The interests of the heir at law and next of kin respectively are unsubstantial and may be disregarded. The whole income of the estate had been applied or was applicable in pursuance of the trusts of the testator's will.

Next, as to the beneficiaries under the will. Before the death of the deceased a group of persons, namely (1.) the deceased himself, (2.) Olive his wife, (3.) his son William Reginald, (4.) his son Michael Montgomerie, and (5.) his daughter Gillian Mary, afterwards the wife of J. R. Yolland, were interested in the estate of the testator. After the death of the deceased, in pursuance of other provisions of the testator's will, a second group, consisting of (1.) William Reginald, (2.) the wife of William Reginald, (3.) Michael Montgomerie and (4.) Gillian Mary Yolland were so interested. The members of this group who were members of the former group derive their interests from provisions of the testator's will different from those under which they became members of the former group. Thus William Reginald is a member of the second group as equitable tenant for life in possession instead of in remainder, which was his position in the first group. The wife of William Reginald was not a member of the first group, but is a member of the second. Michael Montgomerie was a member of the former class as son of the equitable tenant for life; his position in the second group is that of brother and not son. The result is that the property has passed from the first group to the second, and the fact that the second group contains some persons who are also members of the first is not material where they owe their position in the second group, not to their former title, but to a new title. The property passes to the group of which they are members because of their new title.

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(1) [1899] A. C. 198, 212.

Oct. 27. *W. P. Spens K.C.* replied.

The House took time for consideration.

1936. Nov. 27. LORD RUSSELL OF KILLOWEN. My Lords, this appeal raises a question which, in view of the conflict of judicial opinion which has arisen, is obviously one of difficulty. It arises in consequence of the settlement of his property made by a testator by a will drawn in an unusual form. The main question is (i.) whether on the death of the testator's son Harry the whole property passed under s. 1 of the Finance Act, 1894, or must be deemed to have passed under s. 2 of the same Act, or (ii.) whether the whole property did not so pass, or is not to be deemed to have so passed. If the latter view should prevail, further questions arise in regard to portions, charges and other subsidiary matters, which do not arise if the first branch of the main question is answered in the affirmative.

Upon an information filed by the Crown against the trustees of the will, Finlay J. held that the whole property passed under s. 1 of the Act. On appeal the late Master of the Rolls and Maugham L.J. held that the property did not pass under s. 1, but must be deemed to pass under s. 2, sub-s. 1 (*b*), of

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the Act. Romer L.J., on the other hand, agreed with Finlay J., and was of opinion that the property passed under s. 1. This difference of opinion made no difference in the result, for it was decided that estate duty was payable on the principal value of the whole property, and the appeal was dismissed with costs.

The trustees have appealed to your Lordships' House. They contend that both views are wrong, and that neither was there a passing under s. 1, nor can the property be deemed to have passed under s. 2, with the result, gratifying to them but disappointing to the Exchequer, that no estate duty is payable at all.

The testator made his will on May 30, 1912. He had then four sons living—namely, James (his eldest son and heir at law), Harry, Reginald, and Algernon. The testator made no disposition of any kind by his will in favour of James. His name is never mentioned. By his will the testator made a strict settlement of his real estate and bequeathed his residuary personal estate upon trust to be invested in the purchase of freehold hereditaments to be settled to the uses upon the trusts and subject to the powers and provisions to upon and subject to which they would have been held if they had been purchased with capital money arising from a sale of his settled real estate. The real estate was (with one important modification to be referred to in detail later) settled in favour of Harry, with remainder after his death in trust for his sons successively in tail male, and in default of such issue in favour of Reginald with remainder after his death in trust for his sons successively in tail male, and in default of such issue in favour of Algernon with remainder after his death in trust for his sons in tail male; and in default of such issue, the testator declared trusts in favour of a named cousin, and after his death in favour of the living sons of that cousin successively, with remainder in each case in trust for the son's sons successively in tail male, with remainder in trust for the sons of the cousin thereafter born successively in tail male, with an ultimate remainder to the use of the testator's own right heirs.

The important modification to which I have referred was that no life interest was conferred upon the testator's sons, nor upon his cousin, nor upon the living sons of his cousin. In each case a trust was declared in identical terms, of which I can quote the trust in relation to Harry and his issue as an example of all. It runs thus: "I declare that the said trustees shall hold the said real property and the net rents and profits thereof in trust as hereinafter mentioned (that is to say) in trust out of the said net rents and profits to pay to my said son Harry . . . . during his life a yearly allowance of such amount from time to time and by such instalments as the said trustees shall in their uncontrollable discretion think fit and after his death in trust for his first and other sons severally and successively according to seniority in tail male."

In the same way the testator cut down the interest of every tenant in tail male born during his life, not to a life interest, but in manner indicated by the following clause: "Provided always and I declare that if and in every case where any person who under the foregoing trusts would be an equitable tenant in tail male by purchase shall be born in my lifetime the interest hereinbefore conferred on such person shall be excised from this my will and instead and place thereof the said trustees shall hold the said real property and the net rents and profits of the same in trust out of the said net rents and profits to pay to such person during his life a yearly allowance of such amount from time to time and by such instalments as the said trustees shall in their uncontrollable discretion think fit and after his death in trust for his first and other sons severally and successively according to seniority in tail male."

Two further provisions in the will must be noted. One declared that during the life of any person who was to receive a yearly allowance the trustees should from time to time apply all the residue of the rents and profits over and above what might be expended on such allowance to the reduction of capital charges affecting the real property or some part thereof. The other provision ran thus: "Provided also and

I hereby declare that it shall be lawful for the said trustees instead of paying any such allowance to the person who under any of the foregoing trusts or provisions would be entitled to receive the same to apply the same for his benefit or for the benefit of any wife child or remoter issue of his or for the benefit of any person who if he were dead would be entitled to receive the net rents and profits of the said real property or an allowance thereout or for the benefit of any two or more of such several objects as the said trustees may in their uncontrollable discretion think fit."

Having now referred to the relevant provisions of the will I may state the events which happened and which have given rise to the questions in debate.

The testator died on June 15, 1918, leaving him surviving his said four sons, the wife of his son Harry and three children of Harry—namely, an eldest son William, a second son Michael, and a daughter Gillian. There were then no capital charges on the property. Harry died on November 1, 1931, leaving him surviving his wife, his three children, and a grandchild, the child of Gillian. During the period which elapsed between the death of the testator and the death of Harry (over thirteen years) the trustees of the will paid away by way of Harry's allowance the whole of the net rents and profits, with the exception of a sum of about 1500*l.* which remained in their hands at Harry's death. By far the larger amount had been paid to or applied for the benefit of Harry, but substantial sums had also been paid to, or applied for the benefit of, his wife and each of his three children. In exercise of a power contained in the will Harry had charged the property with two portions of 5000*l.* each in favour of his children Michael and Gillian; and on his death those two portions became immediately raisable and payable. Subject thereto, and to a jointure of 1000*l.* per annum in favour of his widow, the property became on Harry's death subject to a trust to pay out of the net income during William's life the before mentioned allowance to William, with power to the trustees instead of paying it to William to apply it for his benefit or for the benefit of all or any of any wife, child or remoter issue of his, or any person who, if William were dead, would be entitled to the net rents and profits or an allowance thereout, and (so far as not so applied) to discharge the said 10,000*l*. portions. The question is whether in those circumstances the property passed or must be deemed to pass on the death of Harry.

The appellants contend in the first place that the objects of a discretionary trust have no beneficial interest in the trust property, and that the only persons beneficially interested in the property both before and after Harry's death are the testator's heir at law and next of kin, and that consequently the property did not pass on that death. They further say that even if the objects of a discretionary trust have a beneficial interest, then since some of the individuals who were objects of the trust during Harry's life were also objects of the trust after his death, there could be no passing of the property as a whole under s. 1. As regards s. 2, sub-s. 1 (*b*), they argued that the interest contemplated by that provision must be an interest capable of valuation under s. 7, sub-s. 7, of the Act, and that therefore the interest (whatever it might be) of an object of a discretionary trust could not be an interest within s. 2, sub-s. 1 (*b*). Their contentions on the main questions may be shortly stated thus: There was no passing of the property at all because no one had a beneficial interest therein except the heir at law and next of kin; or if others had a beneficial interest, there was no passing of the property as a whole owing to the overlapping of interests. The property could not be deemed to pass because the interests (if any) which ceased on the death were incapable of valuation.

My Lords, in order to arrive at a just conclusion on these contentions it is in my opinion essential to determine in the first place what is the true construction and effect of these peculiar testamentary provisions. The primary trust during Harry's life is to pay him "a yearly allowance" out of the net rents and profits, the quantum from time to time depending upon the discretion of the trustees. All the income which accrues during Harry's life is available for this purpose, and is so available during the whole of his life. There is nothing to confine the allowance for one year to the rents and profits of that year; the unapplied balance of any year could be applied in any subsequent year. Consequently during Harry's life the primary trust is to pay him a yearly allowance and carry forward the balance for future application if the trustees think fit. The balances so carried forward or any part of them might be applied in reduction of capital charges had any existed. Throughout Harry's life there was a power to withhold payment to him of his allowance, and to apply it for the benefit of Harry and the other persons described, or for the benefit of any one, two, or more of such persons; but what is applied under this power is still Harry's allowance. On Harry's death, leaving William him surviving, a new trust comes into operation during the life of William. Then the primary trust is to pay to William a yearly allowance out of the net rents and profits which accrue during his life and any balance remaining unapplied at Harry's death. The same remarks apply to this allowance. There is a power to apply it for the benefit of any one, two, or more of a group of persons—namely, William, his wife, children or remoter issue and the person who if William were dead would be entitled to receive the rents and profits or an allowance thereout. But so long as the 10,000*l.* portions remain unpaid the trustees would, I think, be bound to apply any balance not appropriated to providing William's allowance in paying off the portions. If those portions were paid off during William's life, they would be entitled to carry over unapplied balances so as to be available in subsequent years for William; and unless the entail had been barred (an event which would destroy the possibility of any one else ever becoming entitled to an allowance under the trusts of the will) they would be entitled to carry over the unapplied balance (if any) remaining at William's death so as to be available for the benefit of a future allowancer.

It will thus be seen that the interest of the testator's heir at law and next of kin in the property extends only to the balance (if any) of the net rents and profits accruing during the periods in which allowances are payable, which are not applied by the trustees in providing the allowances and which remain after the 10,000*l.* portions and any other portions which might be charged by other allowancers and all other capital charges, if any, have been paid off. Even this balance they could not claim to have paid to them until either all the people who might be entitled to receive an allowance were dead, or (the entail having been barred) some one had become entitled to the property for an estate in fee simple in possession. The heir at law and next of kin had no interest in corpus. Such interest as they had was no doubt vested in them at the testator's death, but the value and importance of it could be effectively gauged at the death of Harry. At that date all the net rents and profits which had accrued since the death of the testator (nearly 115,000*l.*) had been applied in providing Harry's allowance, save and except a sum of 1500*l.* which then became available for William's allowance, and for reduction of the portions charge. In my opinion the state of affairs which prevailed at Harry's death is sufficient to show that the beneficial interest of the heir at law and next of kin in the property was microscopic. So far from their being the only persons beneficially interested in the property before and after Harry's death, their interest is so minute and so remote that it may for our present purpose be ignored. But the actual facts mentioned above only show that the trustees in fact carried out the intention of the testator as evidenced by his will in which he speaks of the allowancers as persons " entitled " to receive an allowance, and from which all reference to his eldest son is carefully excluded.

What then happened at Harry's death ? In order to test whether it can be said that the property passed on his death, one must compare the position as regards the persons beneficially interested in the property immediately before the death with the position immediately afterwards. Immediately before Harry's death the persons beneficially interested in the property were primarily Harry, as the person entitled to an allowance, and secondarily, by way of substitution in respect of that allowance, a group consisting of Harry, his wife, his three children, William, Michael and Gillian, and Gillian's child. It is true that no one of them could claim to be beneficially interested in any defined share of or to any defined extent in the property; but the six together constituted the only people who could, while Harry was alive, obtain any benefit from the property or have any beneficial enjoyment of the property. The heir at law and next of kin could not. They could no doubt realize for what they might be worth their interests which I have already described and analysed; but they could not claim to receive any of the net rents and profits.

Immediately after Harry's death who were the persons beneficially interested in the property? Primarily William as the person then entitled to an allowance, and secondarily by way of substitution in respect of that allowance a group consisting of William, his wife, and his brother Michael so long as no son was born to William. Similarly this group of three persons constituted the only people who immediately after Harry's death could obtain any benefit from the property or have any beneficial enjoyment thereof. True it is that the group so entitled is susceptible of change. Thus owing to the subsequent birth of a son to William, the son has joined the group and Michael has left it; and the births of other children to William would increase the number of members of the group, or again, the death of William's infant son would bring Michael back into the group again. But for our purpose the essential thing to see is who was beneficially interested immediately after the death of Harry. It was a new group, becoming interested under a new trust, and fulfilling a new qualification as a condition of membership.

It so happens that William is a fixed member of both groups, in the one case as a child of the allowancer, in the other case as the allowancer; and that Michael, who was a fixed member of the first group as a child of the allowancer, became on Harry's death a precarious member of the second group as the person who would be entitled if William were dead. It is said that the fact that certain individuals were members of both groups, shows that part of the beneficial interest in the property resided in the same individuals immediately before and immediately after Harry's death, and that therefore it is impossible to say that there was on Harry's death a change of title in the property as a whole, and that therefore there was no passing under s. 1. I do not agree. The mere fact that a person who becomes entitled to the beneficial enjoyment of property on a death, has already before that death been beneficially interested in the property does not prevent the property passing under s. 1. Instances of this are to be found in the *Cowley* case (1) and the *de Trafford* case (2), in each of which cases a former beneficial interest ceased with the death and a new beneficial interest arose on the death under a different right. In the present case the beneficial interest of the first group ended with Harry's death, and thereupon the beneficial interest of the second group arose under a different trust; and so too as to each member of the first group, his interest as a member of that group ended with Harry's death, and if (but only if) he fulfilled the qualification required for membership of the second group, a new and different beneficial interest then arose in him under a different trust. And that this was a different interest is shown in the case of Michael by the fact that whereas his interest during Harry's life was indefeasible except by his own death, his interest during William's life was precarious and would cease if and so long as there was in existence a son of William.

If there is a trust during A's life of the income of a property for a group of persons fulfilling certain qualifications, the persons who are to share from time to time and the amounts which they respectively take being in the discretion of the trustees, followed on A's death by a similar discretionary trust during B's life of the income of the property for a group of persons fulfilling different qualifications, I would say that the title to the beneficial interest in the property as a whole changed hands on the death of A and passed on his death under s. 1: and that notwithstanding that one or more persons fulfilled both sets of qualifications.

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(1) [1899] A. C. 198.

(2) *De Trafford* v. *Att.-Gen.* [1935] A. C. 280.

The late Master of the Rolls and Maugham L.J., with some doubts, preferred to treat the case as falling under s. 2, sub-s. 1 (*b*), although in some respects their reasons might appear to point rather to a passing under s. 1. Thus the Master of the Rolls, after stating that the class in favour of which the trustees could exercise a discretion after Harry's death was a different class from the class in favour of which the discretion was exercisable before that death, said: "It is cut down to five, and although some of them are the same, the class is not altogether the same, and there has been a passing over from the entity, if I may so call it, before the death of Harry to a different entity. . . . ." And in considering s. 7 of the Act he used the following language: "On the facts as I have stated them that there has been a change of the persons entitled to receive moneys . . . . then what has passed? Well it is the whole interest which has passed. . . . ." Maugham L.J., after stating that there was an interest in the whole of a composite class which ceased on Harry's death, said: "In my opinion a benefit has accrued or arisen by reason of the cesser of the interest to which I have referred, for the benefit of the new class. . . . . The new class is a different class; the benefit which accrues to members of the new class, discretionary I agree, is yet a benefit which accrues to them by reason of a different trust and a different relationship to the original testator. These considerations would no doubt lead me to say that the property passed within s. 1 if it were not for the doubt I have whether it can fairly be said that the property as a whole changed hands."

My Lords, for myself I agree with the views expressed by Romer L.J.—namely, that the property here passed under s. 1 of the Finance Act, 1894. I think that under this will framed as it is, and in view of the remote and negligible interests of the heir at law and next of kin, it can fairly be said that the property as a whole changed hands, or that the title to the property as a whole changed on the death of Harry.

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I would accordingly vary the order of the Court of Appeal by striking out the declaration therein contained. The effect of this will be to restore the declaration contained in the order of Finlay J. With this alteration in the order appealed from, the appeal should be dismissed with costs.

In the view of this case which I have expressed it is neither necessary nor desirable to express any opinion on the subsidiary questions, or upon a point which was discussed —namely, the extent to which the various sub-sections of s. 1 of the Settled Land Act, 1925, are incorporated into the definitions contained in s. 22, sub-s. 1 (*h*) and (*i*), of the Finance Act, 1894.

My Lords, I have been requested by my noble and learned friends Lord Atkin, Lord Thankerton and Lord Macmillan to say that they concur in the opinion which I have expressed.

LORD ROCHE. My Lords, I concur.

Order appealed from varied by striking out the declaration therein contained and, subject to that variation, affirmed, and appeal dismissed with costs.

Lords' Journals, Nov. 27, 1936. (1)

Solicitors for appellants: *Raymond-Barker, Nix & Co.*
Solicitor for respondent: *The Solicitor of Inland Revenue.*

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(1) Cf. *Scott* v. *Commissioners of Inland Revenue*, ante p. 174.

[HOUSE OF LORDS.]

H. L. (E.)* RICHARDS . . . . APPELLANT;

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Dec. 3. GOSKAR . . . . RESPONDENT.

Workmen's Compensation—Injury by accident—Industrial disease—Miner's nystagmus—Disablement—Return to full work—Incomplete recovery from disease—Happening of accident—Whether injury continues—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *ss.* 1, 43, *sub-s.* 1; *Sch.* 3—*Workmen's Compensation* (*Industrial Diseases*) *Consolidation Order,* 1929 (*S. R. & O.*, 1929, *No.* 2).

By s. 43, sub-s. 1, of the Workmen's Compensation Act, 1925, where the duly appointed certifying surgeon certifies that a workman is suffering from a disease as therein mentioned, including miner's nystagmus, and is thereby disabled from earning full wages at the work at which he was employed within the time therein specified, he or his dependants may have compensation under the Act "as if the disease" "were a personal injury by accident arising out of and in the course of that employment," subject to the qualification, among others, that "the disablement . . . . shall be treated as the happening of the accident":—

Held, that the disease itself, and not the certificate of disablement, is the equivalent of a personal injury by accident within the above section. Therefore a miner who has been certified as suffering from miner's nystagmus, and as being thereby disabled from earning full wages at the work at which he was employed, and who returns to his employment at his former wages although he has not in fact recovered from the disease, and again becomes disabled thereby, can rely upon the original certificate and need not obtain a fresh certificate in order to obtain compensation.

Judgment of Romer L.J. in *McNicholas* v. *West Leigh Colliery Co.* (1933) 26 B. W. C. C. 29, 44, approved and preferred to the decision of the Court of Appeal in *Timmins* v. *Brodsworth Main Colliery Co.* [1934] 2 K. B. 361; 27 B. W. C. C. 283.

Wilsons and Clyde Coal Co. v. *Flynn* [1930] A. C. 516; 23 B. W. C. C. 159, and *McDougall* v. *Summerlee Iron Co.* 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419, explained.

Order of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal.

One Brinley Richards, the appellant, was and had been for some years a coal miner employed by the Dulais Anthracite Collieries, Ld. His average weekly earnings were 2*l.* 9*s.* 4*d.* On February 1, 1932, he was examined by a certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which he was employed, and was certified to be suffering from miner's nystagmus and to have been since January 20, 1932, disabled thereby from earning full wages at the work at which he was employed. A. E. Goskar, the respondent, was receiver and manager of the Dulais Anthracite Collieries, Ld., which was in liquidation. From January 29, 1932, the respondent paid the applicant 8*s.* 6*d.* a week as compensation for partial incapacity.

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* *Present:* LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

On March 18, 1932, the applicant filed in the county court of Glamorganshire holden at Neath and Port Talbot an application for arbitration claiming compensation under the Workmen's Compensation Acts, 1925–1931 (1), on the ground of total disability from January 18. The county court judge awarded the applicant 1*l.* 4*s.* 10*d.* a week as compensation on the basis of total incapacity.

On September 8, 1932, the respondent served on the applicant a notice under s. 12 of the Workmen's Compensation Act, 1925, of his intention to reduce the weekly payments

(1) Workmen's Compensation Act, 1925, s. 1, sub-s. 1: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained."

Sect. 43, sub-s. 1: "Where (1.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act" (which includes miner's nystagmus) "and is thereby disabled from earning full wages at the work at which he was employed . . . . and the disease is due to the nature of any employment in which the workman was employed at any time within twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—

(*a*) The disablement or suspension shall be treated as the happening of the accident." . . . .

Sub-s. 2: "For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given."

to 8*s*. 6*d*. a week on the ground that the applicant had partially recovered from the effects of the disease and was capable of doing some surface work. As the result of correspondence between the applicant's solicitors and the respondent the applicant on September 26, 1932, tried surface work and his compensation was reduced to 9*s*. 9*d*. a week. He continued work on these terms until October 10, 1932, when he found himself unable to continue.

On April 11, 1933, the applicant filed an application for a continuation of the award of 1*l*. 4*s*. 10*d*., but his application was dismissed on May 10. On May 13 the applicant returned to his old work underground at wages exceeding his average weekly earnings before his disablement. He was allowed to work with his brother to help him, and continued so to work until August 15, when he obtained a fresh certificate of disablement from a certifying surgeon. The respondent appealed from this certificate, and on September 28, 1933, the medical referee allowed the appeal, certified that the applicant was not disabled by miner's nystagmus, and thereby nullified the certifying surgeon's certificate of August 15. On October 21, 1933, the applicant returned to full work at an average weekly wage of 3*l*. 9*s*. 7*d*., and continued at this work until December 16, 1933, when he and other workmen of the Dulais Anthracite Colliery were discharged, and the colliery closed down shortly afterwards. In May, 1934, by means of a false declaration the applicant obtained work at another colliery, but on June 21 his fraud was discovered and he was dismissed. From that date onwards he failed, in spite of his efforts, to obtain employment and had been in receipt of unemployment benefit at the rate of 17*s*. a week.

On November 27, 1934, the applicant filed in the county court an application to review or increase or fix a weekly payment under the Workmen's Compensation Acts, 1925–1931, in respect of personal injury caused to him by accident arising out of and in the course of his employment. The nature and date of the accident were given as " Miner's Nystagmus. Disablement as from January 20, 1932." He further stated that under an award dated May 13, 1932, and an unrecorded agreement of September 30, 1932, he had been in receipt of 9*s*. 9*d*. a week as partial compensation, but that no compensation had been paid since about May 13, 1933. The respondent by his answer denied that the applicant had been incapacitated for work since May 17, 1933.

The county court judge found that the applicant was on April 24, 1935, suffering from miner's nystagmus and likely to develop the disease more easily because of the condition following his former disablement; but held that the applicant's claim was based on the certificate of the certifying surgeon dated February 1, 1932, fixing January, 1932, as the date on which the disablement commenced; that this disablement ceased on May 13, 1933, and that the applicant could not recover compensation for a disablement in June, 1934, without a fresh certificate. He therefore dismissed the application.

The applicant appealed to the Court of Appeal. That Court (Slesser and Roche L.JJ. and Swift J.) affirmed the decision of the county court judge and dismissed the appeal.

The applicant appealed to this House.

1936. June 29. *E. W. Cave K.C.* and *T. Jenkin Jones* for the appellant. The question in this appeal is whether a miner who has been certified as suffering from miner's nystagmus and as being disabled from earning full wages at the work in which he was employed, and who returns to his former work at his former wages although he has not in fact recovered from the disease, but again becomes disabled thereby, can rely on the certificate which he has obtained; or whether he must obtain a second certificate of disablement before he can receive compensation for the second disablement. By s. 43 of the Act of 1925 a workman who according to the certificate of the certifying surgeon is suffering from certain diseases, of which miner's nystagmus is one, and is thereby disabled from earning full wages at the work at which he was employed "shall be entitled to compensation under this Act as if the disease . . . . were a personal injury by accident arising out of and in the course of his employment." Then by sub-cl. (*a*) "The disablement . . . . shall be treated as the happening of the accident." The Court of Appeal held that they were bound by *Timmins* v. *Brodsworth Main Colliery Co.* (1) and *Durrant* v. *British Fibrocement Works, Ld.* (2), to hold that the certificate of disablement is the happening of the accident, and that if a workman having obtained a certificate of disablement afterwards returns to work at his former wages, the disablement has ceased, and consequently, inasmuch as the disablement is to be "treated as the happening of the accident," the injury by accident has ceased, and, if the man is again found to be suffering from the disease, before he can say that he is again injured by accident he must obtain a new certificate. The better opinion is that expressed by Romer L.J. in *McNicholas* v. *West Leigh Colliery Co.* (3) "It is," said the Lord Justice, "the disease that he," the workman, "is entitled to treat as the injury, and not the disablement, from which it follows that he does not cease to be entitled to treat himself as having sustained injury by accident merely because his disablement ceases temporarily. He continues to be entitled to treat himself as suffering from an injury arising out of an accident so long as he suffers from the disease." That, it is submitted, is the true view of the Act, and it is supported by the decision of this House in *Richard Evans & Co., Ld.* v. *Scahill.* (4) It follows also from *French* v. *Archibald Russell, Ld.* (5), that mere disablement is not personal injury by accident; what constitutes personal injury by accident is disease, which may be followed by disablement or by death. Any other view is inconsistent with *Penrikyber Navigation Colliery Co.* v. *Edwards.* (6)

June 30. *Edgar Dale* and *Montague Berryman* for the respondent. This case is covered by the decision of this House in *McDougall* v. *Summerlee Iron Co.* (7) followed by *Timmins* v. *Brodsworth Main Colliery Co.* (1) and *Durrant* v. *British Fibrocement Works, Ld.* (2) The certified disablement from earning full wages is the accident. A workman cannot suffer injury from an accident before the accident happens. In the words of the Act, s. 43, sub-s. 1 (*a*) : " the disablement . . . . shall be treated as the happening of the accident." The disablement certified as having commenced in January, 1932, had ceased long before the commencement of the fresh disablement of June, 1934. The certificate relating to the former disablement had expired, and the appellant had no certificate on which to base a new disablement. Therefore there was no accident and consequently no injury from accident.

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(1) [1934] 2 K. B. 361; 27 B. W. C. C. 283.

(2) (1934) 27 B. W. C. C. 460.

(3) (1933) 26 B. W. C. C. 29, 44.

(4) (1927) 20 B. W. C. C. 348.

(5) 1934 S. C. (H. L.) 5; 27 B. W. C. C. 338.

(6) [1933] A. C. 28; 25 B. W. C. C. 303.

(7) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

Cave K.C. in reply. *McDougall* v. *Summerlee Iron Co.* (1) is explained by Lord Warrington of Clyffe in *Connor* v. *Cadzow Coal Co.* (2), on the ground that the workman had completely recovered from his first attack of nystagmus. In *Timmins* v. *Brodsworth Main Colliery Co.* (3) the workman had in fact obtained a fresh certificate, which was held to have superseded the original one.

The House took time for consideration.

Dec. 3. LORD ATKIN. My Lords, this appeal raises a question of vital importance in respect of the provision made by the Workmen's Compensation Act for compensation to workmen who suffer from industrial disease. In the present case the workman in 1932 suffered from an industrial disease, miner's nystagmus, and being duly certified received compensation. There has been no further valid medical certificate in respect of him. The county court judge has found that he has not recovered from the disease, but that he has been able to earn and has earned full wages. He finds, therefore, that the disability to earn full wages has ceased, and, treating himself as bound to hold that such disability is the accident, finds that he is unable to award compensation, though the man is now suffering from the same disease and may now by reason of the disease be wholly or partially

(1) 1927 S. C. (H. L.) 72 ; 20 B. W. C. C. 419.

(2) [1932] A. C. 1, 5 ; 24 B. W. C. C. 396, 402.

(3) [1934] 2 K. B. 361 ; 27 B. W. C. C. 283.

incapacitated. Such a result is, of course, impossible under the working of the Act when applied to ordinary accidents. It is common for men to recover so far from an injury by accident that they can earn pre-accident wages and yet to suffer from a recrudescence of the injury caused by the original accident so as to be again incapacitated. In that case they obtain compensation unless indeed it has been terminated by award. But where there is a reasonable prospect of recrudescence no judge does absolutely determine the compensation. The question is whether the position is different in cases of industrial disease. There can be no doubt that the cases of *Timmins* v. *Brodsworth Main Colliery Co.* (1) and *Durrant* v. *British Fibrocement Works* (2), decided in the Court of Appeal, bound the learned county court judge to come to this conclusion. Those cases are founded on what was said in this House in *McDougall* v. *Summerlee Iron Co.* (3), and it must be conceded that there are passages in the opinions in that case which indicate the view that in industrial diseases the effect of the Act is that the certified disability to earn full wages is the accident, and that when such disability ceases compensation is thereafter at an end, though the disease continues.

My Lords, I hope to be able to show from the Act itself, from the decision in the House of Lords and from subsequent decisions in this House that the legal position is not that which has been adopted by the Court of Appeal and the county court judge.

Apart from the decisions the meaning of the relevant sections seems clear enough. Sect. 43 indicates three conditions on which a workman or his dependants will be entitled to compensation. (1.) Certificate that the workman is suffering from an industrial disease and that he is thereby disabled from earning full wages; (2.) Suspension under the Factory Acts on account of having contracted such disease; (3.) Death caused by such disease.

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(1) [1934] 2 K. B. 361; 27 B. W. C. C. 283.

(2) (1934) 27 B. W. C. C. 460.

(3) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

If any of those conditions is fulfilled and the disease is due to the nature of the employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, the workman or his dependants " shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications :—

(*a*) The disablement or suspension shall be treated as the happening of the accident."

The principal other modifications are that the compensation is to be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease is due. By sub-s. 2 the date of disablement is the date certified by the certifying surgeon or if no such date is certified the date of the certificate. Proviso (*b*) is important: " Where a workman dies without having obtained a certificate of disablement, or is at the time of death not in receipt of a weekly payment on account of disablement, it shall be the date of death."

One further matter should be mentioned. Modification (*e*) preserves the necessity of notice by providing to whom notice of the death, disablement or suspension is to be given. By s. 14, sub-s. 1, notice of the accident must be given " as soon as practicable after the happening thereof." It was necessary to adapt to industrial diseases the provisions as to notice, and modification (*a*) is obviously introduced for that purpose, to enable the workman to know of what he is to give notice and from what time. In no other section than s. 14, sub-s. 1, is " the happening of the accident " referred to.

The sufferer from industrial disease is to be entitled to compensation " under this Act " ; and Part II. of the Act dealing with industrial diseases is obviously intended to be written into Part I. so that the machinery provided for the relief of workmen injured by ordinary accidents can be applied with the necessary modifications to workmen suffering from industrial disease. In the case of ordinary accidents the sequence of events is clear. Employment, accident arising in the employment, personal injury or death caused by accident (s. 1), total or partial incapacity for work resulting from the injury (s. 9). Shortly, the sequence is accident, injury, incapacity.

Now it is to be noted that the certified " disability " or the " suspension " referred to in s. 43 does not take the place of, or necessarily establish, that incapacity for work which measures the compensation. The certificate is only of disability from earning full wages at the work at which he was employed. The county court judge in case of dispute has to decide whether there is total or partial incapacity for work resulting from the injury (s. 9) either in the work at which the workman was employed or any other suitable work. That it is incapacity from the *injury* that has to be decided is made clear by other sections. I will refer to s. 9, sub-s. 4, providing for a workman " who has so far recovered from the injury as to be fit for employment of a certain kind." What the Act by s. 43 has provided is that industrial disease due to the nature of the employment is equivalent to an injury by accident arising out of the employment. The certificate of " disablement " like the " suspension " is necessary to fix the stage at which the progressive disease can reasonably be treated as an injury by accident; and the time of the happening of the accident for the purpose of notice and for some purposes of calculating wages is fixed by the certificate or date of suspension.

But translate disablement into " accident " for all purposes and the scheme falls to pieces. If disablement is the accident what is the injury? And if disablement be, as it is, disablement caused by disease—the words of the Act are " is thereby disabled "—what has the judge to consider when he is determining whether there is incapacity resulting from the injury? He must at this stage disregard the certified disablement from the " accident," and revert to the disease. On this construction disease which in terms is the injury, and by the statute is an injury caused by accident, has yet caused the accident. The only comparable sequence that occurs to me arose when Alice learned from the White Queen's accident

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the art of living backwards; first the bandage then the bleeding then the pin prick. It must be noticed that in the case of death there may be no certificate of disablement and no suspension, and that modification (*a*) has no application. Hence presumably, even under the construction now being discussed, if a workman dies from industrial disease without being certified, the conception of accident is different from that in cases of certification. Another remarkable result of this construction is that the accident may come into existence when the workman is not employed at all. He may have ceased work in the disease-producing employment for months before he consulted the surgeon, who may not be able to fix a date for disablement which will then be the date of the certificate, as in the case of *Richard Evans & Co.* v. *Scahill.* (1) Another result of the present contention, as was very clearly pointed out by Romer L.J. in *Timmins* v. *Brodsworth Main Colliery Co.* (2), is that though a man suffering from an industrial disease recovers compensation as though he had suffered an injury by accident, and though he is still suffering from the disease; yet when the disability to earn full wages ceases the notional accident ceases its notional existence. I am quite unable to fit into the Act or even to conceive the idea of an accident continuing or ceasing to exist notionally or otherwise. What happens is not that the accident ceases but that the injury ceases, and I venture to think that this is true whether you are considering a wound or an industrial disease.

Now let us consider the question upon authority. As to an ordinary accident there never has been any doubt that the mere fact that incapacity, even partial, has ceased, and that the workman has been earning pre-accident wages, is no bar to his claim for compensation if he shows that his subsequent incapacity is the result of the old injury. I need only refer to the language of Lord Dunedin in *Wilsons and Clyde Coal Co.* v. *Burrows* (3), where he says that under s. 18 it is

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(1) (1927) 20 B. W. C. C. 348.

(2) [1934] 2 K. B. 361; 27 B. W. C. C. 283.

(3) [1929] A. C. 651, 658; 22 B. W. C. C. 430, 440.

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a relevant inquiry "whether the injury was of such a character that there was, owing to the injury, some more or less latent disability at the time but which at any time might break out, and which, therefore, would give a reasonable probability of unfitness for employment supervening"; or as Lord Sumner puts it (1) it is part of the duty of the medical referee "to consider the question whether there were any signs of those well known liabilities to attract other diseases or further exhibitions of the same disease as an ulterior consequence of the accident, which are noticed from time to time."

My Lords, no trouble seems to have arisen until in the case of industrial disease there was more than one certificate of disablement. If after a man has been certified and receives compensation, a certifying surgeon subsequently certifies that he is suffering from an industrial disease and fixes the date of disablement as about the date of the new certificate, can the workman rely upon the injury certified in the first certificate? The question is chiefly important as determining the employer who is to pay compensation, where the employers have changed. The difficulty is raised by the terms of the opinions expressed in *McDougall* v. *Summerlee Iron Co.* (2), decided on April 1, 1927.

Only about a month before that case there had been given a considered judgment of this House in *Richard Evans & Co.* v. *Scahill* (3) (February 21, 1927). In that case a miner had been certified in July, 1923, and August, 1924, to have been disabled by nystagmus. In February, 1925, the medical referee appointed on an application by the employers under Sch. I., s. 15, of the Act of 1906 certified the workman "is not suffering from miners' nystagmus. He is hyperopic and has incipient cataract; his condition is such that he is fit for surface work; his incapacity is not due to the accident." The employers thereupon ceased to pay compensation. But on July 22, 1925, the workman obtained a fresh certificate that he was suffering from miner's nystagmus and was thereby disabled from earning full wages. This certificate did not fix the date of disablement and under the Act therefore this disablement dated from the date of the certificate. The learned county court judge had found that the disease from which the applicant was suffering in 1925 was the same disease as in 1923, i.e., was a continuation of it, and he granted compensation. This House held that the terms of the certificate of January, 1925, did not preclude him from finding as he did, and upheld the award of compensation, notwithstanding that the man had not been in the employment of the employers for more than twelve months before July, 1925. I think it is plain that the House recognized that the only material question was whether the applicant had recovered from the original disease; that though in February, 1925, there were no symptoms of incapacity due to the disease yet, as visible symptoms come and go, if the disease in July was the original disease, the workman was entitled to recover. I see no trace of any suggestion that the vital question was whether the "disablement" had ceased; indeed the decision suggests that it is irrelevant.

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(1) [1929] A. C. 660; 22 B. W. C. C. 442.

(2) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

(3) 20 B. W. C. C. 348.

In *McDougall's* case (1) a workman had been certified as disabled by miner's nystagmus in 1923 and received compensation; but in April, 1924, he accepted 50*l.* under a registered agreement in discharge of all claims in respect of present disabilities and future risks from that attack of nystagmus. In May, 1924, he resumed full work underground and was again certified on September 12, 1925, as disabled by miner's nystagmus. The date of disablement was given as September 11, 1925. On a claim for compensation the Sheriff-Substitute found that it was practically certain that some traces of miner's nystagmus remained when the applicant started work in May, 1924, but they did not then disable him from earning full wages, but holding that the disablement of September 11, 1925, was a fresh accident, he awarded him compensation. It was apparently not in dispute that if the incapacity were due to the old accident the workman would be barred by the release, which, however, did not affect a

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(1) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

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claim in respect of a new accident. The Court of Session reversed the decision. They took the view that the arbitrator had in substance found that the applicant had not recovered from the old disease and that his present incapacity was due to it. Holding that the mere ceasing of the disability in the sense of the ceasing for a time of the incapacity to earn full wages was no bar to recovery in respect of the old accident they held the applicant bound by the release. In the House of Lords this decision was reversed. Lord Haldane, after stating, as would appear erroneously, that by sub-s. 2 of the then s. 8, where the workman was employed in a scheduled process the relevant scheduled disease is deemed to have been the cause of the disablement and calling attention to the report of the Medical Research Committee on nystagmus, says (1): " It is not unnatural that the disablement and the disease should be treated as indistinguishable, and I think for the present purpose they were really indistinguishable in fact as well as indistinguishable under the statute. Under the statute it is plain to my mind that what we have to deal with here is the disablement." My Lords, if in the statute disablement means the same thing as disease I can understand the proposition. But with the greatest respect for the noble Lord if they are different I cannot understand how an industrial disease, whether it be miner's nystagmus or lead poisoning, can be indistinguishable from the inability to earn wages, the result of the disease. The suffering workman, I imagine, could distinguish. Lord Dunedin agrees with the exposition of the section by Lord Haldane, but also, and this is what causes trouble, " with what the Sheriff-Substitute said in a single sentence." I am not sure what the sentence was but I think it is " I was of opinion that what entitled a workman to compensation in such a case is not the presence of the disease, but the disablement arising therefrom." Lords Phillimore and Blanesburgh do not give reasons of their own on this point. Lord Warrington, however, says (2): " The arbitrator has found that the disablement resulting from the original attack of the disease had ceased. The result of that seems to me to be that the workman can no longer be treated as suffering injury by accident arising from the first attack of the disease. There then comes a fresh attack causing fresh disablement, and a fresh certificate, and those elements together constitute a fresh injury by accident in respect of which he is entitled to compensation." He further says that he concurs in thinking that it is quite irrelevant in the present case to consider whether or not there remained traces of the disease during any part of the time in question. The material circumstance was that the disablement which is essential to the accident had ceased.

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(1) 1927 S. C. (H. L.) 76; 20 B. W. C. C. 426.

(2) 1927 S. C. (H. L.) 72, 79; 20 B. W. C. C. 429.

My Lords, there can be no doubt that the language used by the noble Lords or some of them creates difficulty, especially as they dissent from the opinions delivered in the Court of Session, which had put on the Act what I have ventured to suggest is the obvious meaning of it. But the decision can be supported by the view that the finding as to the disease continuing was only an inference of the Sheriff-Substitute. He had before him a fresh certificate in September, 1925, fixing the date of disablement to be September 11, 1925, i.e., the date on which the disablement by the disease commenced (Workmen's Compensation Act, 1925, s. 43, sub-s. 2). It would appear to follow that the previous disablement must be referred to an outbreak of the disease from which the workman had recovered. And it will appear that this explanation is given of the decision by Lord Warrington himself in a subsequent case in the House of Lords which appears to me quite inconsistent with *McDougall's* case (1), if disability really means accident. I must first refer to *Wilsons and Clyde Coal Co.* v. *Flynn.* (2) There a miner had twice suffered from nystagmus, and being disabled thereby had been in receipt of compensation; but had after each occasion commuted his compensation for a lump sum. He was out of employment from November, 1927, to February, 1929, when

(1) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

(2) [1930] A. C. 516; 23 B. W. C. C. 159.

he resumed work with new employers, but after working two hours had to leave, and on February 18 was certified as suffering from nystagmus and the date of disablement was certified to be February 15, 1929. It appeared from the evidence that he was still suffering from the original nystagmus which disabled him in November, 1927. The arbitrator, accepting this evidence, held it proved that the present disablement was not due to the nature of his employment within twelve months before the date of disablement (Workmen's Compensation Act, 1925, s. 43, sub-s. 1), and refused compensation. The House of Lords, affirming the Court of Session, held that this was wrong and that the certificate was conclusive of the right to compensation, for it conclusively fixed the date of disablement and the arbitrator could not vary it. Lord Dunedin referred to *McDougall's* case (1) with the object of showing that that case treated the certificate as conclusive. He does, however, say (2): "The First Division," in *McDougall's* case (1), "had held—and it is put most concisely in a single sentence by Lord Blackburn—that the existence of the disease and not the disablement was the accident. Of course, that has been held to be wrong." My Lords, Lord Blackburn did say that, and was clearly wrong, for the disease is not the accident but is an injury by accident. I do not, however, regard *Wilsons'* case (3) as deciding anything but the finality of the certificate where the certifying surgeon has fixed the date of disablement. Now, however, we come to *Connor* v. *Cadzow Coal Co.* (4), where *McDougall's* case (5) was again discussed. In that case the miner who had been disabled by nystagmus and been in receipt of compensation was certified by the medical referee on September 25, 1929, to have recovered from his attack of miner's nystagmus and "to be fit for his ordinary work." It must be noticed that the certificate states two things: the disease is at an end; the disability is at an end. The workman claimed that he had not recovered and could bring his case under s. 9, sub-s. 4. The Sheriff-Substitute allowed a proof, but was reversed on appeal by the Court of Session. On the first hearing before this House the matter was remitted to obtain from the medical referee an answer to the question whether he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after and in consequence of the attack more susceptible to the disease than he had been before it. Now if the decision in *McDougall's* case (1) meant what is alleged, such an inquiry must have been irrelevant. The ceasing of the disability had been conclusively certified, and whether the disease continued or not would have been immaterial. Their Lordships therefore cannot have construed *McDougall's* case (1) in the sense contended for, and this is shown by the sequel. The medical referee answered the question in the negative and thereupon this House reversed the decision of the Court of Session. All their Lordships took the view that the material question was whether the disease still subsisted. Lord Buckmaster said (2) that if a man had been once attacked and had completely recovered, recurrence of the disease would be due to his original susceptibility; but if the recovery be not complete there is the added probability of a recurrence owing to the fact that the original conditions caused by the first attack have not completely passed away. " In the case of a complete recovery the second attack must be regarded as an independent accident, and this is made plain in the judgment of Lord Warrington of Clyffe in the case of *McDougall* (1)." This opinion was concurred in by Lord Dunedin. Lord Warrington in agreeing said (3): " The respondents relied upon *McDougall's* case (1), but in my opinion this causes no difficulty. The workman had there been disabled by nystagmus, he had been fully compensated by payment of a lump sum and had been certified as having completely recovered. He was again attacked by the disease

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(1) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

(2) [1930] A. C. 524; 23 B. W. C. C. 169.

(3) [1930] A. C. 516; 23 B. W. C. C. 159.

(4) [1932] A. C. 1; 24 B. W. C. C. 396.

(5) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

(1) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

(2) [1932] A. C. 5; 24 B. W. C. C. 402.

(3) [1932] A. C. 8; 24 B. W. C. C. 405.

and obtained a fresh certificate of disablement. All that this House decided was that this disablement was a fresh injury by accident, and I cannot see that this has any bearing on the present case." Lord Warrington seems to have been mistaken if he meant that there had been a certificate of having completely recovered before the last certificate. But it seems plain that he considered that there had been conclusive proof of recovery from the disease; and that fact was the ground of the decision. Lord Thankerton stating that the parties were agreed that the certificate must be taken as meaning that the workman was left more susceptible to the disease than he was before the first attack says (1): "It follows that the workman has not completely recovered from that disablement." This must be read by reference to a former passage in which he says the appellant's averments mean that he "has not completely recovered from the disablement of February 14, 1928, in respect that that attack of the disease has left him less immune from a further attack, and that the risk of recurrence so engendered is wholly or mainly responsible for his failure to obtain work." Recovery from disablement in this sense must mean recovery from the disease which produced disablement. One does not recover from incapacity but from the cause of the incapacity. This is made clear later in the opinion where he says (1) that counsel for the respondents "argued that a recurrent attack of industrial disease, which disables a workman, must constitute a fresh disablement and he founded on the case of *McDougall* v. *Summerlee Iron Co.* (2) and *Brown* v. *William Dixon, Ld.* (3) But in both these cases the original disablement had ceased before the second attack occurred. In the present case the certificate does not establish that the disablement has ceased." It is perhaps sufficient for the present purpose that Lord Buckmaster with Lord Dunedin's concurrence and Lord Warrington all treat *McDougall's* case (2) as proceeding on the footing that there had been complete recovery from the original disease: and that the final certificate was of a fresh disability from a fresh attack.

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(1) [1932] A. C. 12; 24 B. W. C. C. 409.

(2) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

(3) 1929 S. C. 206; 22 B. W. C. C. 729.

McDougall's case (1) was again discussed in *Penrikyber Navigation Colliery Co.* v. *Edwards.* (2) In that case a miner had been certified to have been disabled by miner's nystagmus from October 17, 1920. From 1920–24 he had been paid compensation for total incapacity. From 1924–26 he worked on the surface. In 1926 he was certified to be still suffering from miner's nystagmus; from that date he was out of employment and was paid for partial incapacity. In January, 1930, he was served with a notice under s. 12, and served a counter notice and the dispute was referred to a medical referee, who certified in February that the workman was not then suffering from miner's nystagmus and the incapacity was not due to nystagmus but to other defects. In March the workman obtained a certificate from the certifying surgeon that he was then suffering from miner's nystagmus and that the date of disablement was October, 1920. The county court judge refused compensation, relying on the medical referee's certificate. The Court of Appeal ordered a new trial, holding that the county court judge had not considered the possibility of a fresh outbreak of the disease since February, 1930. This House directed that the medical referee should state whether he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after and in consequence of the attack more susceptible to the disease than he had been before it, the same question as was put in *Connor* v. *Cadzow Coal Co.* (3) The medical referee answered in the affirmative, in substance saying that the susceptibility to attack was natural and not induced by the first attack of the disease. On this the House held that the certifying surgeon's certificate in March was inconsistent with the medical referee's certificate in February and that the latter must prevail. It will be found from the opinions in this House that every one assumed that the

(1) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

(2) [1933] A. C. 28; 25 B. W. C. C. 303.

(3) [1932] A. C. 12; 24 B. W. C. C. 409.

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question was recovery or not from the disease, and that no one attached importance to the finding that the incapacity was due to another cause. But I only cite the case for passages from the opinions of Lord Dunedin and Lord Warrington. Lord Dunedin, referring to the Act of 1906, says (1): " What was declared to be an accident was not the industrial disease . . . . but the disablement entailed by the disease. In that Act the provisions as to what might happen if the disablement owing to the accident was no longer present . . . . were to be found not in the body of the Act but in the Schedule." My Lords, it is inconceivable to me that if Lord Dunedin ever meant that disablement was the accident in the narrow sense contended for by the respondents he would in the very next sentence have spoken of " the disablement owing to the accident " which would then mean the disablement owing to the disablement. Lord Warrington (2) repeats his explanation of *McDougall's* case (3) which he gave in *Connor* v. *Cadzow* (4): " In *McDougall's* case (3) the man had been certified to have completely recovered from a fresh attack. He was again attacked and obtained a fresh certificate of disablement and it was decided by this House that this fresh disablement was a fresh injury by accident."

In *French* v. *Archibald Russell, Ld.* (5), this House had to consider the effect of the amendment of s. 9, sub-s. 4, of the Act of 1925 by s. 1 of the Act of 1931 where a workman had been certified to have recovered from an attack of nystagmus and to be fit for his ordinary work. He claimed that he was suffering from " the continuing effects of the injury " because he could not get work unless he was able to sign a declaration that he had not previously suffered from nystagmus. In the opinion of Lord Tomlin, in which the other noble and learned Lords concurred, is to be found this statement (6): " It follows that in cases of industrial disease, the injury by accident is not the contraction of the disease simpliciter, but the contraction of the disease plus the consequent disablement or suspension as the case may be." If one adds to this "death," which is independent of a certificate of disablement or of suspension, but with which Lord Tomlin had not to deal, this proposition is unassailable. But it seems to me quite inconsistent with the proposition that disablement alone is the accident. He adds that "continuing effects of the injury" refer to the physical condition of the workman resulting from the injury.

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(1) [1933] A. C. 34; 25 B. W. C. C. 310.

(2) [1933] A. C. 49; 25 B. W. C. C. 325.

(3) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

(4) [1932] A. C. 12; 24 B. W. C. C. 409.

(5) 1934 S. C. (H. L.) 5; 27 B. W. C. C. 338.

(6) 1934 S. C. (H. L.) 17; B. W. C. C. 346.

The construction of the Act for which the appellant contends is that adopted by the Court of Appeal in *McNicholas* v. *West Leigh Colliery Co.* (1) In that case the miner had been certified in 1928 to have been disabled by nystagmus. But in 1931 the medical referee had given a certificate which showed, as stated by Lord Hanworth M.R., that at that date he was not suffering from nystagmus: his incapacity was non-existent; there was on his part no idiopathic condition which made him susceptible to miner's nystagmus, and if he had a fresh onset of nystagmus that would be due to the susceptibility which arose out of the attack in April, 1928, but at that time there was no incapacity. Nevertheless the Court made a declaration of liability. Romer L.J. in the course of his judgment said (2): "It is, on the plain words of the section, the disease that he is entitled to treat as the injury, and not the disablement, from which it follows that he does not cease to be entitled to treat himself as having sustained injury by accident merely because his disablement ceases temporarily. He continues to be entitled to treat himself as suffering from an injury arising out of an accident so long as he suffers from the disease." This appears to me to be plainly right, and to lead necessarily to the relief given by a declaration of liability. The decision under appeal on the other hand necessarily cuts out the possibility of a declaration of liability in cases of industrial disease, a very serious diminution of the rights of the workman existing in relation to ordinary accidents. In the case under appeal Swift J. criticized this statement of Romer L.J. as being

(1) (1933) 26 B. W. C. C. 29. (2) 26 B. W. C. C. 44.

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inconsistent with some of the language used by the Lord Justice in *Timmins* v. *Brodsworth Main Colliery Co.* (1) I agree that there is some difficulty in reconciling the two cases; but of the two I prefer the former, the principle of which I think bound the Court of Appeal in the latter case, and appears to me, for the reasons I have given, to be in accordance both with principle and with the current of the cases in this House later than *McDougall's* case. (2)

My Lords, the simple question is whether a workman who has been certified to have been disabled by an industrial disease and is found to be still suffering from that disease and to be disabled by that disease, is debarred from recovering compensation because for some time after the original disablement he was able to earn full wages at the employment in respect of which he was originally certified. Such a proposition, as it appears to me, is quite inconsistent with the rights given in the case of ordinary accidents; it is inconsistent with the terms of the Act including ss. 12 and 18, which apply to both ordinary accidents and to causes of industrial disease. It is supported by what I venture to think is too narrow a construction of the decision in *McDougall* (2), a construction which in the narrow form seems to me not only inconsistent with every other section of the Act but to have been rejected in subsequent decisions of this House to which two out of three of the noble Lords who gave opinions in *McDougall's* case (2) were parties. It appears to me that the workman in this case was entitled to have his claim for compensation assessed by the county court judge, and that the appeal should be allowed and the case remitted to him for that purpose.

The orders in the Court of Appeal and in the county court must be set aside, and the appellant should have his costs here and in the Courts below.

LORD RUSSELL OF KILLOWEN. My Lords, when the argument on this appeal had concluded my conviction was

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(1) [1934] 2 K. B. 361; 27 B. W. C. C. 283.

(2) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

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that the appeal should be allowed if it were possible to adopt that course in the face of what this House had said and decided in the case of *McDougall* v. *Summerlee Iron Co.* (1) I confess that I had thought it impossible so to do. I have, however, had the opportunity of reading and considering the opinion of the noble Lord on the Woolsack. It has opened up a way through what I feared was an impasse, and I accordingly am prepared to concur in the motion proposed.

LORD MACMILLAN. My Lords, I am convinced that the decision which we are about to pronounce is consonant with both the spirit and the letter of the statute. Like my noble and learned friend Lord Russell of Killowen I experienced some difficulty in reconciling our conclusion with the views expressed in this House in the case of *McDougall* (1), and I am glad that it has proved possible to surmount this difficulty in a manner so satisfactory.

Order of the Court of Appeal complained of reversed: Cause remitted back to the County Court of Glamorganshire holden at Neath and Port Talbot with a direction to the judge of the said county court to assess the claim of the appellant for compensation. Further ordered that the respondent do pay to the appellant the costs incurred by him in the Courts below and also the costs incurred by him in respect of the said appeal to this House.

Lords' Journals, Dec. 3, 1936.

Solicitors for appellant: *John T. Lewis & Woods, for Randell, Saunders & Randell, Swansea.*

Solicitors for respondent: *Bramall & Bramall, for F. E. Metcalfe, Bristol.*

(1) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

Considered. CANADIAN FED. OF AGRICULTURE *v*. ATT.-GEN. FOR QUEBEC [1951] A. C. 179

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AND

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Dominion Statutes—Constitutional validity—Legislation passed in performance of treaty obligations—Property and civil rights in the Province affected—Invalid legislation—Distribution of legislative powers—Based on classes of subjects—Principle unaffected by new international status of Canada—Totality of legislative power by co-operation with Provinces—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92 (13), 132—*Weekly Rest in Industrial Undertakings Act,* 1935, *St. Can.* (25 & 26 *Geo.* 5, *c.* 14)—*Minimum Wages Act,* 1935, *St. Can.* (25 & 26 *Geo.* 5, *c.* 44)—*Limitation of Hours of Work Act,* 1935, *St. Can.* (25 & 26 *Geo.* 5, *c.* 63).

The Weekly Rest in Industrial Undertakings Act, 1935, the Minimum Wages Act, 1935, and the Limitation of Hours of Work Act, 1935, of the Parliament of Canada, which in substance gave effect to draft conventions adopted by the International Labour Organization of the League of Nations in accordance with the Labour Part of the Treaty of Versailles, 1919, and ratified by the Dominion of Canada, were ultra vires of the Parliament of Canada and invalid in that the legislation related to matters coming within the class of subject " Property and civil rights in the Province " which was assigned exclusively to the Legislatures of the Provinces by head 13 of s. 92 of the British North America Act, 1867.

In re Legislative Jurisdiction over Hours of Labour [1925] Can. S. C. R. 505, referred to.

The legislation could not be justified under s. 132 of the British North America Act, which provided that the Parliament of Canada should have " all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries," because the obligations under the ratified conventions were not the obligations of Canada as part of the British Empire, but of Canada by virtue of her new status as an international juristic person, and they did not therefore arise under a treaty between the British Empire and foreign countries.

In re The Regulation and Control of Radio Communication in Canada [1932] A. C. 304, applied.

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT M.R., and SIR SIDNEY ROWLATT.

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Jurisdiction to legislate for the purpose of performing the obligations of a Canadian treaty does not reside exclusively in the Parliament of Canada: *In re The Regulation and Control of Aeronautics in Canada* [1932] A. C. 54, and *In re The Regulation and Control of Radio Communication in Canada* [1932] A. C. 304, do not afford a warrant for the contrary view.

For the purposes of the distribution of legislative powers between the Dominion and the Provinces under ss. 91 and 92 there is no such thing as treaty legislation as such. The distribution is based on classes of subjects, and as a treaty deals with a particular class of subject so would the legislative power of performing it be ascertained.

No further legislative competence was obtained by the Dominion from its accession to international status and the consequent increase in the scope of its executive functions. There was no existing constitutional ground for stretching the competence of the Dominion Parliament so that it became enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affected the classes of subjects enumerated in s. 92 legislation to support the new functions was within the competence of the Provincial Legislatures only; if they did not, the competence of the Dominion Legislature was declared by s. 91 and existed ab origine. The Dominion could not, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

Further, the present legislation was not concerned with matters of such general importance as to justify the overriding of the normal distinction of powers in ss. 91 and 92.

Dicta of Duff C.J. in *In re The Natural Products Marketing Act* [1936] Can. S. C. R. 398, at 414 et seq., approved and applied.

Lastly, in totality of legislative powers, Dominion and Provincial together, Canada was fully equipped to legislate in performance of treaty obligations, but the legislative powers remained distributed, and if in the exercise of her new functions derived from her new international status Canada incurred obligations, they must, so far as legislation was concerned, when they dealt with Provincial classes of subjects, be dealt with by the totality of powers—by co-operation between the Dominion and the Provinces.

APPEAL (No. 100 of 1936), by special leave, from a judgment of the Supreme Court of Canada (June 17, 1936) answering questions referred to the Court by Order of the Governor-General in Council, dated November 5, 1935. The questions referred asked whether the Weekly Rest in Industrial Undertakings Act, 1935, the Minimum Wages Act, 1935, and the Limitation of Hours of Work Act, 1935, or any of the provisions thereof and in what particular or particulars or to what extent, were ultra vires of the Parliament of Canada. The Statutes in question, which dealt with the matters denoted by their titles, were passed by the Dominion Parliament in accordance with conventions adopted by the International Labour Organization of the League of Nations in accordance with the Labour Part of the Treaty of Versailles of June 28, 1919. The conventions had been ratified by the Dominion.

The facts, the relevant provisions of the Treaty of Versailles and of the British North America Act, 1867, appear from the judgment of the Judicial Committee.

In the Supreme Court of Canada, Duff C.J., Davis and Kerwin JJ. were of opinion that, except as to s. 6 of the Minimum Wages Act, the three Statutes were intra vires. Rinfret, Cannon and Crocket JJ. were of opinion that the Acts were ultra vires. The judgments of the Supreme Court are reported at [1936] Can. S. C. R. 461.

1936. Nov. 13, 16, 17, 19, 20 and 23. *R. S. Robertson K.C.*, *L. S. St. Laurent K.C.*, *C. P. Plaxton K.C.*, *Peter Wright* and *R. St. Laurent* for the Attorney-General for Canada. The Statutes deal with the matters their titles indicate. Admittedly the matters dealt with by the Statutes would ordinarily come within head 13 of s. 92 of the British North America Act, and be matters of Provincial concern, and there must therefore be found some ground for taking them out. The Dominion rely on the fact that it was performing a duty under the Treaty of Versailles in compliance with the provisions of s. 132 of the British North America Act. The obligation to enact the legislation arose under the Treaty, and s. 132 applied. If that be not so, in any event the conventions were validly entered into and the obligation to perform them was an obligation of the Dominion of Canada which it could properly discharge by enacting the legislation in question, really making an application of *In re The Regulation and Control of Radio Communication in Canada*. (1) Reliance is also placed on the peace, order and good government aspect of the matter in the same way as it was relied on in the *Radio* case. (1) Against the Dominion, either in the Cases which

(1) [1932] A. C. 304.

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have been filed or in the reasons in the judgments against the Dominion, the following questions arise: (1.) That the Dominion has no power to enter into such conventions with any foreign State; (2.) that Canada did not in fact ratify the conventions; and (3.) that s. 132 of the British North America Act has no application. It was further said that, even if Canada did validly ratify the conventions, the matters to which they related were matters on which the Provinces alone could legislate. [Reference was made to the preamble of the Weekly Rest in Industrial Undertakings Act, and to arts. 158, 405, 406 and 407 of the Treaty of Versailles.] Under art. 405, para. 5, a member having received a draft convention was to bring it before the authority within whose competence "the matter" lay. It is submitted that that related to what was called ratification. "The matter" was the matter of ratification—there was no convention at that time. If it meant not ratification but performance, then was the authority within whose competence the matter lay the authority who might do the act or pass the legislation in performance of the convention in case it was ratified? Was that the competent authority, or does it mean the authority who would pass such legislation if there were no such convention at all? The Dominion says that it is the former, the Provinces say the latter. [Reference was made to *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co., Ld.* (1), and to the draft conventions to show the procedure that was followed, and to the reasons and occurrences which, it was alleged, accounted for the long delay on the part of Canada between the date of the drafting of the conventions at Geneva and their acceptance by Canada.]

It is submitted that *In re Legislative Jurisdiction Over Hours of Labour* (2) was wrongly decided. The *Radio* case (3) was the case of a convention, not of a treaty, and therefore s. 132 of the British North America Act did not apply. The performance of obligations under the conventions is not to depend on whether the subject-matter is one coming within

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(1) [1914] A. C. 237, 252.
(2) [1925] Can. S. C. R. 505.
(3) [1932] A. C. 304, 311.

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the enumerated heads of s. 92. By the transference of the treaty-making power to the Dominion executive, and correlative power to legislate to carry out the obligations, nothing is taken from the Provinces.

[LORD ATKIN. The Dominion has not got unlimited powers of legislation.]

The residuary clause of s. 91 of the British North America Act is capable of the construction, which is not inconsistent with decided cases, that where Canada has properly incurred an international obligation with respect to any matter whatsoever, that within whatever classes in ss. 91 and 92 it may be described as coming under other circumstances, once the matter has assumed the aspect of an international bargain it is no longer to be treated as belonging to any one of the enumerated classes.

[LORD ATKIN. That is a very far-reaching doctrine: it means that Canada could make an agreement with any State which would seriously affect Provincial rights.]

It is a power which cannot be exercised by Canada alone; some other country must be found which is willing to enter into a bargain. This matter must not be looked at as though Canada is going to look about the world to find some one with whom to make an agreement for the purpose of robbing the Provinces of their constitutional rights. But, logically, it must be admitted that whatever Canada and such other country agree to do can be effected by Canada. There are three propositions as to the power of the Dominion to enter into or to advise His Majesty in respect to the making of international obligations: (1.) An obligation arose directly from the Treaty of Versailles, and the conventions in question were entered into under that obligation, and s. 132 of the British North America Act therefore applies to the powers of the Dominion. (2.) Even if the matter cannot be put as high as a treaty obligation, at least under the Treaty of Versailles the necessary power was given to advise His Majesty in respect of such conventions. (3.) By the constitutional developments, particularly since the Treaty of Versailles, the constitutional right to advise His Majesty in respect of international obligations affecting Canada has become vested in his Canadian Ministers. That is sometimes expressed by saying that the right to exercise the prerogative in respect of Canadian affairs has been transferred to the Canadian executive. It is submitted that as to both the second and third of the above propositions the power of the Dominion to legislate in performance of the obligations arises either on a proper interpretation of s. 132 of the British North America Act or on the principles outlined in the *Radio* case. (1) The power to legislate must be obtained under one or other of those two heads.

With regard to art. 405, para. 7, of the Treaty of Versailles, once consent was obtained from the Senate and the House of Commons in 1935, and it is submitted that consent was obtained, then there was no right to refuse to ratify—it was a treaty obligation on the executive Government of Canada to ratify.

[LORD ATKIN. How did the consent without legislation of the Senate and the House of Commons become a matter which made them the competent authority ?]

First, it is ordinary constitutional practice to ask the approval of the body which will, in the event of the engagement being entered into, have the power to enact the legislation. Secondly, it is the only competent authority to pass the legislation where a convention has been entered into: *Attorney-General of British Columbia* v. *Attorney-General of Canada*. (2) There has been a direct and unbroken chain of obligation existing under the Treaty of Versailles; there has been the agreement of the High Contracting Parties that all these things will be done, step by step, if conditions arising from time to time are fulfilled. Every condition here, it is submitted, has been fulfilled, and there has been consent by the legislative body which alone would have power to carry out the Treaty. The legislation could not be enacted by the Provinces afterwards. Even if the Board should be of opinion that at some point there is a missing link in the chain of obligation, it is submitted that the Treaty of Versailles, and

(1) [1932] A. C. 304. (2) [1924] A. C. 203.

particularly art. 405, definitely and expressly recognizes the power of Canada to enter into such obligations as a member of the League of Nations and as a member of the Labour Organization.

With regard to the position after ratification, when s. 132 of the British North America Act speaks of obligations as part of the British Empire towards foreign countries, those words describing the international obligation should be given a broad meaning. " Empire " there ought to be read as " His Majesty." The performance of the obligations loses its aspect of being a private matter of the individual inhabitants of Canada and becomes one of nation-wide importance, and not one which is to be divided among the Provinces. The Statutes in question are, with the exception of s. 6 of the Minimum Wages Act, merely in compliance with a treaty obligation : that is all the Dominion professes to do ; it has not claimed any broad jurisdiction in these matters as having been taken out of s. 92, but merely seeks to deal with them for this one special purpose. Upon a fair and proper construction of the residuary power it should be deemed to extend to the performance of international obligations. A valid obligation was entered into, and the legislation in question was validly enacted to carry it out. [Reference was also made to Oppenheim's " International Law," 4th ed., 1928, vol. I., p. 194 ; Anson's " Law and Custom of the Constitution," 4th ed., 1935, vol. II., p. 87 ; Keith's " Constitutional Law of the British Dominions," 1st ed., 1933, pp. 99–100, and p. 394 et seq. ; and to Noel Baker's " The Present Juridical Status of the British Dominions in International Law," 1929 ed., p. 197–8 ; and *In re Regulation and Control of Radio Communication*. (1)]

Plaxton K.C. followed. The Dominion Parliament has the capacity under the residuary power to give effect to a convention not within the purview of s. 132 of the British North America Act, and that was so held in the *Radio* decision. (2) A matter which may be local and Provincial

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(1) [1931] Can. S. C. R. 541, 545, 551.
(2) [1932] A. C. 304, 311, 313.

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in its nature may assume another aspect once the country becomes committed as a whole to some other country under a treaty. [Reference was made to *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co.* (1); to Oppenheim's "International Law," 4th ed., vol. I., p. 716; and to Westlake's "International Law," 2nd ed., 1910, pt. I., p. 290, and to *Attorney-General of British Columbia* v. *Attorney-General of Canada.* (2)

A. W. Roebuck K.C., A.-G. for Ontario, and *I. A. Humphries K.C.* for the Attorney-General for Ontario. Sect. 132 of the British North America Act gives no treaty-making power to the Dominion Government, but it does confer on the Parliament authority to carry out the obligations of treaties validly made on behalf of both the Dominion and the Provinces. The argument so far presented leaves the Province as a mere municipal institution, a mere nonentity in Imperial and foreign relations. That was not the intention of the framers of the British North America Act; the Province has obligations to foreign countries. The power given by s. 132 is not an exclusive power; it may be an overriding power.

The authority competent to sign a treaty creating obligations is the King or some authority specially delegated to do so by the King. [Reference was made to *In re The Initiative and Referendum Act* (3), and to *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick.* (4)] There are no grounds whatever for saying that the parties to advise His Majesty in matters relating to the jurisdiction of the Provinces have in some way come to be the Dominion Ministers. The Province has the right to advise the Crown in matters where its legislative powers apply. Ontario has a right to enter into an agreement with another part of the British Empire or with a foreign State. So far as legislative and executive authority are concerned the Governor-General and the Lieutenant-Governors of the Provinces, and the Dominion Parliament and the Provincial

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(1) [1923] A. C. 695, 704.

(2) [1924] A. C. 203.

(3) [1919] A. C. 935, 941-2.

(4) [1892] A. C. 437, 441.

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Legislatures are equal in status. The Treaty of Versailles is binding on Ontario as part of the British Empire. It is not to be considered that those who drafted the Canadian constitution intended to write a constitution which was subject to defeat in its main provisions by competing jurisdictions. The concentration of power in the hands of the Dominion is fatal to Canada as it has been known in the past. The Statute of Westminster, 1931, does not change a word in the British North America Act. The only place in the Treaty of Versailles where there is a binding obligation that would qualify under s. 132 of the British North America Act is art. 405, para. 5. It is hard to find in the Treaty that the Dominion have anything to do beyond submitting to the competent authority. In any event, the words "authority or authorities" in that paragraph clearly contemplate the possibility of the legislation being carried out in alternative jurisdictions. And the words "within whose competence the matter lies" must mean within whose competence "to legislate" the matter lies: "the matter" is the subject-matter of the conventions, in this instance, the three Acts in question. The competence only went to the Dominion after the obligation confirming ratification became completed. On the strength of the dates and facts as to ratification, the ratification was not in accordance with the Treaty of Versailles, and no obligation rested on Canada or any of the Provinces which might be carried out under s. 132 of the British North America Act. It has been argued that ratification by Canada constituted an agreement in itself as between countries. From the form of the ratification it was not an agreement, but only amounted to an offer. It was not signed by the King, but by the Under-Secretary of State for External Affairs of Canada.

The subject-matter in the *Radio* case (1), and the *Aeronautics* case (2), was in each instance within s. 91, and not within s. 92 of the British North America Act, so that there is a complete distinction between those cases and the present one, except on one ground. If it were held that the

(1) [1932] A. C. 304. (2) [1932] A. C. 54.

present matters were of such national importance, of such wide import as to affect the body politic of the Dominion in the overriding way that was found in *Russell* v. *The Queen* (1), if they were taken out of the specific heads of s. 92, then Ontario is satisfied to see this legislation supported. With regard to the overriding features of this legislation, the Province of Ontario looks on the legislation as good, and believes that it is in the public interest; but they are unfortunate in being called upon to fight a bad principle in connection with a good measure. The Acts are of national importance, and the subject has attained such proportions as to affect the body politic.

J. B. McNair K.C., A.-G. for New Brunswick, and *Frank Gahan* for the Attorney-General for New Brunswick. To succeed in supporting the legislation on the Geneva conventions the Dominion must in the final analysis establish two propositions or principles: (1.) That the Dominion has the capacity to create treaty obligations binding on the Provinces; and (2.) that the Parliament of Canada has power to perform such obligations. The first involves the performance of executive power; the second, the performance of legislative power. The word "treaty" is used as meaning international agreements. The Dominion have based their contention that the legislation is valid primarily on the Peace Treaty. If, however, they are driven from that ground, they take the position that the conventions would stand on their own legs. It is submitted, as to the Peace Treaty, that there was no obligation of any kind on which s. 132 of the British North America Act could operate. It was contended for the Dominion that "the matter" in art. 405, para. 5, of the Treaty of Versailles meant the matter of ratification. It is suggested that it means the matter of the proposals. And the question which is the authority which is competent must be determined under the relevant laws of the particular member in relation to the actual matter dealt with by the proposals. Sect. 132 merely gives an overriding power. The subject-matter must be determined having regard to the other

(1) (1882) 7 App. Cas. 829.

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provisions of the British North America Act. On the correct view of the provisions of the latter part of the treaty the Dominion obtains no support through the operation of s. 132. That means that in the final analysis the conventions must stand on their own feet without any support whatever from the treaty. Considered on that footing, the first question is, to what executive act of the Dominion authorities can the appellant point as creating by treaty in the broad sense an obligation binding on the Provinces, and which Parliament is competent to perform. It seems obvious, so far as executive acts are concerned on which those conventions standing alone can be founded, that the search is limited to the resolution of the two Houses of Parliament adopting or approving each convention ; to the Order of the Governor-General in Council ; and to the order or decision of the Cabinet or Ministry.

Mr. McNair then dealt with the history and development of the treaty-making power in relation to the Provinces of Canada, and submitted the following propositions : (1.) Treaties made by His Majesty as sovereign head of the Empire bind in the diplomatic sense all parts of the Empire, and His Majesty's subjects therein so far as the provisions are applicable thereto. (2.) The treaty-making power is one of the prerogatives of the King which in the aggregate represents the residuum of discretionary sovereign power. (3.) Originally in Great Britain the treaty-making power and the treaty-performing power were vested in the same person. In other words, the King was sovereign in fact as in name. This simple relationship was affected by various constitutional developments in Great Britain and the Empire : (*a*) the growth of representative institutions ; (*b*) Parliamentary sovereignty ; (*c*) responsible government ; (*d*) Colonial self-government ; (*e*) the Federal system of government in Canada ; and (*f*) the growth of the British Commonwealth of nations. Sect. 132 of the British North America Act does not provide for the withdrawal from the competence of the Provinces of matters allocated to them by the other provisions of the British North America Act—it merely gave the Parliament of Canada or the Dominion executive an overriding power. The power of

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legislating under the initial words of s. 91 of the British North America Act is an overriding power, to be exercised in a national emergency. [Reference was made to the *Aeronautics* case (1); and to arts. 407 and 408 of the Treaty of Versailles.]

With regard to the two propositions which I mentioned in opening, what are the treaty-making authorities to which the Dominion can conceivably point in this case? There are a number of possible authorities: (1.) The two Houses of Parliament which passed the resolutions; (2.) the Governor-General; (3.) the Governor-General in Council; (4.) the Dominion Cabinet; (5.) the Secretary of State for External Affairs; and (6.) Parliament. If the Dominion through any of these authorities has the right to exercise sovereign power over the Provinces in relation to treaty making, it must come from one of four sources: (1.) From the King by direct delegation; (2.) from the King by delegation acquiesced in; (3.) from Imperial statute; and (4.) from Dominion statute. No power from any source was given to any of the above bodies to enter into treaties binding upon the Provinces of Canada. The Dominion can only enter into agreements with other States in respect of matters which fall within her legislative competence.

The appellant has taken the position that in the *Radio* case (2) the Board decided that treaty obligations arising under international law were equivalent in all respects to contractual obligations arising under private law, and governed on all points by like principles. In other words, the Dominion maintains in the present case that the *Radio* case (2) decided that Canada by virtue of its new status—the Dominion authority having charge of external affairs—had acquired a capacity to contract, and that that capacity on the analogy of the principles of private law embraces, or extends to, not only the formation but the performance of contractual obligations. By advancing those proposals the Dominion reaches the position where it contends that the Parliament of Canada has achieved supremacy over the Provinces. The answer to that is that the acquisition of the new status which Canada is supposed to have achieved

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(1) [1932] A. C. 54.

(2) [1932] A. C. 304.

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affects nothing more than the constitutional position of Downing Street. If by virtue of a new status Canada is to have the right by treaties to change the law of the Provinces it should be by constitutional amendment.

The real gist of the judgment in the *Radio* case (1) is that radio was a new subject not embraced within the enumerated heads of s. 92 of the British North America Act, and that it fell either within the enumerated heads of s. 91 or within the residuary powers of the Dominion. If the principles in the judgment of the Chief Justice in the present case stand the Canadian Parliament has achieved supremacy, within limits, over the Provinces. It has never had it before, and it means that the principle enunciated by this Board about the object of the British North America Act in numerous cases is completely destroyed. [Reference was made to *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (2).] With regard to the position taken by Ontario so far as they based their suggestion that this legislation should stand on the ground of expediency, New Brunswick cannot accede to that principle in the case of constitutional legislation. What is good for one Province is not necessarily good for another.

J. W. de B. Farris K.C. and *Wilfrid Barton* for the Attorney-General for British Columbia. British Columbia also wishes to dissociate itself from the submissions of Ontario supporting the legislation on the ground that it is intra vires the Dominion Parliament under the power conferred by s. 91 to make laws for the peace, order, and good government of Canada. If the legislation be upheld on that ground it will be even more fatal, even more of an invasion of Provincial rights, than if it is upheld under treaty-making powers. It would mean a declaration by the Board that matters which have in each Province been specifically set aside for that Province under s. 92 can now, by what is termed a change in recognition of conditions, be entirely eliminated from s. 92 and put into s. 91. [Reference was made to *Attorney-General for Ontario v. Attorney-General for the Dominion* (3); *Toronto Electric Commissioners v. Snider.* (4)]

(1) [1932] A. C. 304.
(2) [1892] A. C. 437.
(3) [1896] A. C. 348, 361.
(4) [1925] A. C. 396, 410.

If the Federal legislation be upheld it will mean that the legislation of British Columbia dealing with matters similar to those dealt with by the legislation in question must go by the board. There is surely constitutional precedent for legislation by subordinate powers legislating to fulfil international obligations of the supreme authority. There are Provinces in Canada fully clothed with constitutional power to implement the obligations of the conventions. If there be now some added power given to Canada by her new relationship in the Empire which did not exist in 1867, while she may acquire that power in connection with her relations with foreign countries she has not acquired it in the sense of being given an overriding power that she never had in the balance of these two sections—91 and 92. [The preamble to the Statute of Westminster, 1931 (22 Geo. 5, c. 4), was read.] It is the nature of the subject-matter itself which determines the class into which it falls. The British North America Act, 1867, has been said to be in the nature of a treaty by which the Provinces surrendered certain of their rights and preserved others. The matters dealt with by the present legislation fall within s. 92—property and civil rights in the Province—and are therefore within the exclusive legislative competence of the Provinces. [Reference was made to the *Radio* case (1) and the *Aeronautics* case (2).]

With regard to art. 405 of the Treaty of Versailles, the Dominion has not brought the draft conventions before the authority or authorities " within whose competence the matter lies," and has not obtained the consent of those authorities as required by art. 405, paras. 5 and 7. As to s. 132 of the British North America Act, in cases of treaties where the subject-matter is, as it is in the present instance, clearly within s. 92, and where legislation by the Provinces, if enacted, is not only adequate, but is the best form of legislation to have, then it is neither necessary nor proper for the Dominion to step in until the Province has had a chance. The Provinces have been given no opportunity after ratification of saying whether they are prepared to fulfil their obligations. [Reference was made to *City of Montreal v. Montreal Street Railway.* (3)]

(1) [1932] A. C. 304, 312.
(2) [1932] A. C. 54, 74, 76.
(3) [1912] A. C. 333, 345.

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Roebuck K.C. said that in treaties affecting subject-matters within the legislative competence of the Provincial Legislatures and bringing into operation the provisions of s. 132 of the British North America Act the King should give his assent on the advice of his Provincial advisers as distinct from his Dominion advisers. It must be in respect of matters within the ordinary Dominion competence when the Dominion Ministers advise. There is nothing in the British North America Act which suggests that foreign affairs as affecting Provincial jurisdiction have been committed to the Dominion Government. The Province is as equally sovereign as the Dominion in its own sphere.

Robertson K.C. replied. There is a chain of obligations arising under the Treaty of Versailles—not created by the Treaty—in the performance of which Canada was bound to pass the legislation in question, and to pass it under s. 132 of the British North America Act. The Provinces have no status to enter into international obligations of any kind. They have only Provincial jurisdiction legislatively. Canada has the right to enter into international obligations so far as Canada is concerned. With regard to the growth and development of the treaty-making power, Canada has a duty to make treaties ; nobody else can make them for her, and the question is, can she perform the treaties ? If the argument for the Provinces is right, then at the same time that Canada's power and duty with respect to the making of treaties was growing her ability to perform them was being automatically lessened. One of the things upon which the parties were able to agree at confederation in respect of matters not provided for, not foreseen, was that they were to go to the Dominion. One of the outstanding dangers at the time of confederation, and to-day, is that of sectional interests and prejudices and private interests interfering with the good government of Canada as a whole. Reliance is placed on the residuary powers as covering the performance of treaty obligations : the *Radio* case. (1) [Reference was also made to *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (2)]

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(1) [1932] A. C. 304, 311, 313. (2) [1923] A. C. 695.

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When a matter has attained an importance which outweighs the civil right of the individual, once it has reached that stage, then the civil right is lost sight of and the matter from an international aspect outshines it and is the one to which attention should be directed. Here an international obligation has arisen and it is the duty of Canada to see that that obligation is performed. Canada alone can perform it, and Canada, therefore, in these particular circumstances and while the obligation endures, is the body to legislate because it is an international obligation. [Reference was made to *Bank of Toronto* v. *Lambe*. (1)] Is not the proper view that once Canada has properly created international obligations then it is necessary for the peace, order and good government of the Dominion that Canada should perform them? It is submitted that that is what is meant by the *Radio* case. (2)

1937. Jan. 28. The judgment of their Lordships was delivered by LORD ATKIN. This is one of a series of cases brought before this Board on appeal from the Supreme Court of Canada on references by the Governor-General in Council to determine the validity of certain statutes of Canada passed in 1934 and 1935. Their Lordships will deal with all the appeals in due course, but they propose to begin with that involving The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act and The Limitation of Hours of Work Act, both because of the exceptional importance of the issues involved and because it affords them an opportunity of stating their opinion upon some matters which also arise in the other cases. At the outset they desire to express their appreciation of the valuable assistance which they have received from counsel, both for the Dominion and for the respective Provinces. No pains have been spared to place before the Board all the material both as to the facts and the law which could assist the Board in their responsible task. The arguments were cogent and not diffuse. The statutes in question in the present case were passed, as their titles recite, in accordance with conventions adopted by the

(1) (1887) 12 App. Cas. 575, 586.

(2) [1932] A. C. 304.

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International Labour Organization of the League of Nations in accordance with the Labour Part of the Treaty of Versailles of June 28, 1919. It was admitted at the bar that each statute affects property and civil rights within each Province; and that it was for the Dominion to establish that nevertheless the statute was validly enacted under the legislative powers given to the Dominion Parliament by the British North America Act, 1867. It was argued for the Dominion that the legislation could be justified either (1.) under s. 132 of the British North America Act as being legislation "necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries," or (2.) under the general powers, sometimes called the residuary powers, given by s. 91 to the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The Provinces contended:—

As to (1.)—(*a*) That the obligations, if any, of Canada under the labour conventions did not arise under a treaty or treaties made between the Empire and foreign countries: and that therefore s. 132 did not apply. (*b*) That the Canadian Government had no executive authority to make any such treaty as was alleged. (*c*) That the obligations said to have been incurred, and the legislative powers sought to be exercised, by the Dominion were not incurred and exercised in accordance with the terms of the Treaty of Versailles.

As to (2.), that if the Dominion had to rely only upon the powers given by s. 91, the legislation was invalid, for it related to matters which came within the classes of subjects exclusively assigned to the Legislatures of the Provinces—namely, property and civil rights in the Province.

In order to indicate the opinion of the Board upon these contentions it will be necessary briefly to refer to the Treaty of Versailles, Part XIII., Labour: to the procedure prescribed by it for bringing into existence labour conventions: and to the procedure adopted in Canada in respect thereto. The Treaty of Peace, signed at Versailles on June 28, 1919, was made between the Allied and Associated Powers of the one part and Germany of the other part. The British Empire was described as one of the Principal Allied and Associated Powers, and the High Contracting Party for the British Empire was His Majesty the King, represented generally by certain of his English Ministers, and represented for the Dominion of Canada by the Minister of Justice and the Minister of Customs, and for the other Dominions by their respective Ministers. The treaty began with Part I. of the covenant of the League of Nations, by which the high contracting parties agreed to the covenant, the effect of which was that the signatories named in the annex to the covenant were to be the original members of the League of Nations. The Dominion of Canada was one of the signatories and so became an original member of the League. The treaty then proceeds in a succession of parts to deal with the agreed terms of peace, stipulations, of course, entered into not between members of the League, but between the high contracting parties, i.e., for the British Empire, His Majesty the King. Part XIII., entitled "Labour," after reciting that the object of the League of Nations is the establishment of universal peace, and that such a peace can only be established if it is based on social justice, and that social justice requires the improvement of conditions of labour throughout the world, provides that the high contracting parties agree to the establishment of a permanent organization for the promotion of the desired objects, and that the original and future members of the League of Nations shall be the members of this organization. The organization is to consist of a general conference of representatives of the members and an International Labour Office. After providing for meetings of the conference and for its procedure the treaty contains arts. 405 and 407 :—

"ARTICLE 405.

"(1.) When the Conference has decided on the adoption of proposals with regard to an item in the agenda, it will rest with the Conference to determine whether these proposals should take the form: (*a*) of a recommendation to be submitted to the Members for consideration with a view to effect being given to it by national legislation or otherwise, or (*b*) of a draft international convention for ratification by the Members.

" (2.) In either case a majority of two-thirds of the votes cast by the Delegates present shall be necessary on the final vote for the adoption of the recommendation or draft convention, as the case may be, by the Conference.

" (3.) In framing any recommendation or draft convention of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

" (4.) A copy of the recommendation or draft convention shall be authenticated by the signature of the President of the Conference and of the Director and shall be deposited with the Secretary-General of the League of Nations. The Secretary-General will communicate a certified copy of the recommendation or draft convention to each of the Members.

" (5.) Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

" (6.) In the case of a recommendation, the Members will inform the Secretary-General of the action taken.

" (7.) In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

"(8.) If on a recommendation no legislative or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member.

"(9.) In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.

"(10.) The above Article shall be interpreted in accordance with the following principle :—

"In no case shall any Member be asked or required, as a result of the adoption of any recommendation or draft convention by the Conference, to lessen the protection afforded by its existing legislation to the workers concerned.

"ARTICLE 407.

"If any convention coming before the Conference for final consideration fails to secure the support of two-thirds of the votes cast by the Delegates present, it shall nevertheless be within the right of any of the Members of the Permanent Organization to agree to such convention among themselves.

" Any convention so agreed to shall be communicated by the Governments concerned to the Secretary-General of the League of Nations, who shall register it."

It will be observed that a draft convention is adopted by a majority of two-thirds of the delegates present : and that at the stage of adoption it has no binding effect on the members : nor do the delegates of members sign it or purport to enter into an obligation on behalf of the members whose delegates they are. "Ratification," therefore, as used in para. 7 of art. 405 is not used in the ordinary sense in which it is used in respect of treaties, the formal adoption by the high contracting party of a previous assent conveyed by the signature of so-called plenipotentiaries. "Consent to" or "accession to" would perhaps better describe the transaction which involves the creation for the first time of any obligation under the convention.

In accordance with the provisions of Part XIII. draft conventions were adopted by general conferences of the International Labour Organization as follows :—

October 29—November 29, 1919, Conference.

Draft Convention limiting the hours of work in industrial undertakings.

October 25—November 19, 1921, Conference.

Draft Convention concerning the application of the weekly rest in industrial undertakings.

May 30—June 16, 1928, Conference.

Draft Convention concerning the creation of minimum wage-fixing machinery.

Each of the conventions included stipulations purporting to bind members who ratified it to carry out its provisions, the first two conventions by named dates—namely, July 1, 1921, and January 1, 1924, respectively. These three conventions were in fact ratified by the Dominion of Canada, Hours of Work on March 1, 1935, Weekly Rest on March 1, 1935, and Minimum Wages on April 12, 1935.

In each case in February and March, 1935, there had been passed resolutions of the Senate and House of Commons of Canada approving them. The ratification was approved by order of the Governor-General in Council, was recorded in an instrument of ratification executed by the Secretary of State for External Affairs for Canada, Mr. Bennett, and was duly communicated to the Secretary-General of the League of Nations. The statutes, which in substance give effect to the draft conventions, were passed by the Parliament of Canada and received the Royal Assent, " Hours of Work," on July 5, 1935, to come into force three months after assent ; " Weekly Rest," on April 4, 1935, to come into force three months after assent ; " Minimum Wage," on July 28, 1935, to come into force, so far as the convention provisions are concerned, when proclaimed by the Governor in Council, an event which has not yet happened. In 1925 the Governor-General in Council referred to the Supreme Court questions as to the obligations of Canada under the provisions of Part XIII. of the Treaty of Versailles, and as to whether the Legislatures of the Provinces were the authorities within whose competence the subject-matter of the conventions lay. The answers to the reference, which are to be found in *In re Legislative Jurisdiction over Hours of Labour* (1), were that the Legislatures of the Provinces were the competent authorities to deal with the subject-matter, save in respect of Dominion servants, and the parts of Canada not within the boundaries of any Province: and that the obligation of Canada was to bring the convention before the Lieutenant-Governor of each Province to enable him to bring the appropriate subject-matter before the Legislature of his Province, and to bring the matter before the Dominion Parliament in respect of so much of the convention as was within their competence. This advice appears to have been accepted, and no further steps were taken until those which took place as stated above in 1935.

Their Lordships, having stated the circumstances leading up to the reference in this case, are now in a position to discuss the contentions of the parties which were summarized earlier in this judgment. It will be essential to keep in mind the distinction between (1.) the formation, and (2.) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it

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(1) [1925] Can. S. C. R. 505.

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has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a State where the Legislature does not possess absolute authority, in a federal State where legislative authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends upon the authority of the competent Legislature or Legislatures.

Reverting again to the original analysis of the contentions of the parties, it will be seen that the Provincial contention 1. (*b*) relates only to the formation of the treaty obligation, while 1. (*c*) has reference to the alleged limitation of both executive and legislative action by the express terms of the treaty. If, however, the Dominion Parliament was never vested with legislative authority to perform the obligation these questions do not arise. And, as their Lordships have come to the conclusion that the reference can be decided upon the question of legislative competence alone, in accordance with their usual practice in constitutional matters they refrain from expressing any opinion upon the questions raised by the contentions 1. (*b*) and (*c*), which in that event become immaterial. Counsel did not suggest any doubt as to the international status which Canada had now attained, involving her competence to enter into international treaties as an international juristic person. Questions were raised both generally as to how the executive power was to be exercised to bind Canada, whether it must be exercised in the name of the King, and whether the prerogative right of making treaties in respect of Canada was now vested in the Governor-General in Council, or his Ministers, whether by constitutional usage or otherwise, and specifically in relation to the draft conventions as to the interpretation of the various paragraphs in art. 405 of the Treaty of Versailles, and as to the effect of the time limits expressed both in art. 405 and in the conventions themselves. Their Lordships mention these points for the purpose of making it clear that they express no opinion upon them.

The first ground upon which counsel for the Dominion sought to base the validity of the legislation was s. 132. So far as it is sought to apply this section to the conventions when ratified the answer is plain. The obligations are not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries. This was clearly established by the decision in the *Radio* case (1), and their Lordships do not think that the proposition admits of any doubt. It is unnecessary, therefore, to dwell upon the distinction between legislative powers given to the Dominion to perform obligations imposed upon Canada as part of the Empire by an Imperial executive responsible to and controlled by the

(1) [1932] A. C. 304.

Imperial Parliament, and the legislative power of the Dominion to perform obligations created by the Dominion executive responsible to and controlled by the Dominion Parliament. While it is true, as was pointed out in the *Radio* case (1), that it was not contemplated in 1867 that the Dominion would possess treaty-making powers, it is impossible to strain the section so as to cover the uncontemplated event. A further attempt to apply the section was made by the suggestion that while it does not apply to the conventions, yet it clearly applies to the Treaty of Versailles itself, and the obligations to perform the conventions arise "under" that treaty because of the stipulations in Part XIII. It is impossible to accept this view. No obligation to legislate in respect of any of the matters in question arose until the Canadian executive, left with an unfettered discretion, of their own volition acceded to the conventions, a novus actus not determined by the treaty. For the purposes of this legislation the obligation arose under the conventions alone. It appears that all the members of the Supreme Court rejected the contention based on s. 132, and their Lordships are in full agreement with them.

If, therefore, s. 132 is out of the way, the validity of the legislation can only depend upon ss. 91 and 92. Now it had to be admitted that normally this legislation came within the classes of subjects by s. 92 assigned exclusively to the Legislatures of the Provinces, namely—property and civil rights in the Province. This was in fact expressly decided in respect of these same conventions by the Supreme Court in 1925. How, then, can the legislation be within the legislative powers given by s. 91 to the Dominion Parliament? It is not within the enumerated classes of subjects in s. 91: and it appears to be expressly excluded from the general powers given by the first words of the section. It appears highly probable that none of the members of the Supreme Court would have departed from their decision in 1925 had it not been for the opinion of the Chief Justice that the judgments of the Judicial Committee in the *Aeronautics* case (2) and the *Radio* case (1) constrained them to hold that jurisdiction to legislate for the purpose of performing the obligation of a treaty resides exclusively in the Parliament of Canada. Their Lordships cannot take this view of those decisions. The *Aeronautics* case (2) concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Sect. 132, therefore, clearly applied, and but for a remark at the end of the judgment, which in view of the stated ground of the decision was clearly obiter, the case could not be said to be an authority on the matter now under discussion. The judgment in the *Radio* case (1) appears to present more difficulty. But when that case is examined it will be found that the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in s. 92, or even within the enumerated classes in s. 91. Part of the subject-matter of the convention, namely—broadcasting, might come under an enumerated class, but if so it was under a heading "Inter-provincial Telegraphs," expressly excluded from s. 92. Their Lordships are satisfied that neither case affords a warrant for holding that legislation to perform a Canadian treaty is exclusively within the Dominion legislative power.

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(1) [1932] A. C. 304.

(2) [1932] A. C. 54.

For the purposes of ss. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the British North America Act gives effect. If the position of Lower Canada, now Quebec, alone were considered, the existence of her separate jurisprudence as to both property and civil rights might be said to depend upon loyal adherence to her constitutional right to the exclusive competence of her own Legislature in these matters. Nor is

(1) [1932] A. C. 304. (2) [1932] A. C. 54.

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it of less importance for the other Provinces, though their law may be based on English jurisprudence, to preserve their own right to legislate for themselves in respect of local conditions which may vary by as great a distance as separates the Atlantic from the Pacific. It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.

It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. It is true, as pointed out in the judgment of the Chief Justice, that as the executive is now clothed with the powers of making treaties so the Parliament of Canada, to which the executive is responsible, has imposed upon it responsibilities in connection with such treaties, for if it were to disapprove of them they would either not be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affect the classes of subjects enumerated in s. 92 legislation to support the new functions is in the competence of the Provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by s. 91 and existed ab origine. In other words, the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

But the validity of the legislation under the general words

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of s. 91 was sought to be established not in relation to the treaty-making power alone, but also as being concerned with matters of such general importance as to have attained "such dimensions as to affect the body politic," and to have "ceased to be merely local or provincial," and to have "become matter of national concern." It is interesting to notice how often the words used by Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1) have unsuccessfully been used in attempts to support encroachments on the Provincial legislative powers given by s. 92. They laid down no principle of constitutional law, and were cautious words intended to safeguard possible eventualities which no one at the time had any interest or desire to define. The law of Canada on this branch of constitutional law has been stated with such force and clarity by the Chief Justice in his judgment in the reference concerning the Natural Products Marketing Act (2) dealing with the six Acts there referred to, that their Lordships abstain from stating it afresh. The Chief Justice, naturally from his point of view, excepted legislation to fulfil treaties. On this their Lordships have expressed their opinion. But subject to this, they agree with and adopt what was there said. They consider that the law is finally settled by the current of cases cited by the Chief Justice on the principles declared by him. It is only necessary to call attention to the phrases in the various cases, "abnormal circumstances," "exceptional conditions," "standard of necessity" (*Board of Commerce* case (3)), "some extraordinary peril to the national life of Canada," "highly exceptional," "epidemic of pestilence" (*Snider's* case (4)), to show how far the present case is from the conditions which may override the normal distribution of powers in ss. 91 and 92. The few pages of the Chief Justice's judgment will, it is to be hoped, form the locus classicus of the law on this point, and preclude further disputes.

It must not be thought that the result of this decision is

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(1) [1896] A. C. 348.

(2) [1936] Can. S. C. R. 398, at 414 et seq.

(3) [1922] 1 A. C. 191.

(4) [1925] A. C. 396.

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that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure. The Supreme Court was equally divided and therefore the formal judgment could only state the opinions of the three judges on either side. Their Lordships are of opinion that the answer to the three questions should be that the Act in each case is ultra vires of the Parliament of Canada, and they will humbly advise His Majesty accordingly.

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Attorneys-General for Ontario and New Brunswick: *Blake & Redden.*

Solicitors for the Attorney-General for British Columbia: *Gard, Lyell & Co.*

[PRIVY COUNCIL.]

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ATTORNEY-GENERAL FOR CANADA APPELLANT;

AND

ATTORNEY-GENERAL FOR ONTARIO AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Dominion Statute—Constitutional validity—Compulsory unemployment insurance legislation—Insurance Act affecting civil rights in the Province—Within exclusive Provincial legislative competence—Invalid Dominion legislation—No severance—No special national emergency—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *s.* 92 (13)—*Employment and Social Insurance Act,* 1935, *St. Can.* (25 & 26 *Geo.* 5, *c.* 38).

The Employment and Social Insurance Act, 1935, of the Parliament of Canada, which in substance provided for a system of compulsory unemployment insurance throughout Canada, was ultra vires of the Dominion Parliament. In pith and substance the Act was an insurance Act affecting the civil rights of employers and employed in each Province and was accordingly within the exclusive competence of the Provincial Legislatures under s. 92, head 13, of the British North America Act, 1867, which provided that " In each Province the Legislature may exclusively make laws in relation to . . . . (13) Property and civil rights in the Province."

The Act did not purport to deal with, and could not be supported on the ground of, any special emergency arising from the degree of unemployment in Canada at the relevant date.

The other parts of the Act were so inextricably mixed up with the insurance provisions of Part III. that it was impossible to sever them, and the whole Act was therefore ultra vires and invalid.

Judgment of the Supreme Court of Canada [1936] Can. S. C. R. 427 affirmed.

APPEAL (No. 101 of 1936), by special leave, from a judgment of the Supreme Court of Canada (June 17, 1936) answering the following question referred to the Court by the Governor-General in Council by an Order dated November 5, 1935: " Is the Employment and Social Insurance Act, or any of the provisions thereof and in what particular or particulars or to what extent, ultra vires of the Parliament of Canada ? " The provisions of the Act, which was passed for the purpose of providing for the establishment of a national employment service and of a national insurance fund against unemployment, as well as other forms of social insurance, are referred to in the judgment of the Judicial Committee.

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT M.R., and SIR SIDNEY ROWLATT.

The Supreme Court of Canada (Rinfret, Cannon, Crocket and Kerwin JJ., Duff C.J. and Davis J. dissenting) answered the question in the affirmative. The judgments of the Supreme Court are reported at [1936] Can. S. C. R. 427.

1936. Nov. 5, 6 and 9. *R. S. Robertson K.C., L. S. St. Laurent K.C., C. P. Plaxton K.C., Peter Wright* and *R. St. Laurent* for the Attorney-General for Canada. The Employment and Social Insurance Act was adopted by the Canadian Parliament in 1935 as a remedial measure for a serious unemployment problem which had spread throughout the whole of Canada as a result of the prolonged trade depression. The scheme of the Act is to set up a national employment service and to establish a national insurance fund against unemployment. The objection to the validity of the Act is that it is said to be legislation of the central Parliament in relation either to property and civil rights within each Province or to matters local and private within each Province as to which exclusive legislative jurisdiction is by s. 92, heads 13 and 16, assigned to the Provincial Legislatures. Canada supports the legislation as a valid exercise of the powers of Parliament for the following reasons: (*a*) Because the main provisions of the legislation are a valid exercise of the powers of the Parliament of Canada under heads 1 and 3 of s. 91 of the British North America Act, 1867, to raise money by a system of taxation and to appropriate the same for the public purposes touching the peace, order and good government of Canada indicated by the legislation. (*b*) Because unemployment has attained such proportions as to render it unquestionably a matter of national interest and importance and as to affect the body politic of the Dominion. (*c*) Because unemployment, through the growing mechanization of industry and other economic causes has ceased to be merely a local or Provincial problem, and has become one of national proportions, interest and importance. (*d*) Because as the Provinces have no power to control the migration of labour from one Province to another, and Provincial boundaries do not affect the movement of labour, legislation to deal effectively with the unemployment problem must be national in its scope. (*e*) Because the legislation is not in pith and substance legislation to regulate property and civil rights in the Province, but is an effort by the Dominion to provide a remedy for a social and economic condition of national concern relating to the peace, order and good government of Canada and its trade and commerce. [Reference was made to the various provisions of the Act.]

The control of insurance has, no doubt, been held to be a matter within the Provincial field; that is as far as the decisions have gone. The following insurance authorities are referred to to ascertain whether in fact anything dealing with insurance is beyond the powers of the Canadian Parliament, and a subject exclusively within the Provincial jurisdiction: *Citizens Insurance Company of Canada* v. *Parsons*. (1) For the international trade of the country the uniformity of unemployment insurance is desirable: that is relied upon as indicating that the subject-matter dealt with is something which has a broader aspect than a local or private matter within the Province. It is not sought to justify this Act in its entirety as being an Act in relation to trade and commerce. It is submitted that it is not everything connected with insurance that is declared by the judgment in *Parsons'* case (2) to be within the exclusive Provincial jurisdiction, but only insurance contracts in their aspect of being property and civil rights within the Province. [Reference was made next to *Attorney-General for Canada* v. *Attorney-General for Alberta*. (3)] It is not so much a question of what are the forms or terms used by the Statute as what is the substance of what has been done. If all Parliament has done is to recognize that the present state of things

(1) (1881) 7 App. Cas. 96, 116.
(2) Ibid. 96.
(3) [1916] 1 A. C. 588, 595–6.

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requires that those who are unemployed shall receive something while unemployed, and if Parliament therefore has attempted to tax the community, or any part thereof, for the purpose of raising a fund to be distributed to the unemployed under certain conditions, there has not been any encroaching on any of the fields exclusively reserved to the Provinces. Parliament is not confined in the appropriation of the funds to objects which are within the enumerated heads of s. 91 of the British North America Act. When unemployment became general it was beyond the resources of the Provinces and Municipalities to cope with it, and the Federal Government provided a very large sum for the relief of unemployment. It was administered by the Municipal authorities subject to audit by both Provincial and Dominion authorities. Unemployment was from ocean to ocean, and the situation was one in which the humane feelings of every citizen of Canada were moved. [Reference was also made to *Attorney-General for Ontario* v. *Reciprocal Insurers* (1), and to *In re Insurance Act of Canada.* (2)] In all the foregoing authorities the Dominion attempted to prescribe under what form insurance business was to be transacted, and throughout this line of cases there was always recognized that the capacity to do insurance business could be conferred by virtue of the central legislation, so that the power is not one which is exclusively within Provincial jurisdiction. [Reference was also made to *Dow* v. *Black.* (3)]

Although this might normally and under ordinary conditions be a matter local and private within the Province, the unemployment problem had reached such dimensions that it had become a threat to the body politic of the Dominion, and was therefore a matter proper to be dealt with by Dominion legislation. It would not be an emergency in the strict sense : *Russell* v. *The Queen* (4), *Hodge* v. *The Queen* (5), and *Attorney-General for Ontario* v. *Attorney-General for the Dominion.* (6) For a matter to be within Dominion legislative

(1) [1924] A. C. 328.
(2) [1932] A. C. 41.
(3) (1875) L. R. 6 C. P. 272.
(4) (1882) 7 App. Cas. 829, 838.
(5) (1883) 9 App. Cas. 117, 130–1.
(6) [1896] A. C. 348, 359.

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competence it must be something which has attained such dimensions as to affect the body politic of the Dominion. No doubt that rule can only be applied with great caution, and that raises the question of what the real situation is in fact: *John Deere Plow Co., Ld.* v. *Wharton.* (1) *Russell* v. *The Queen* (2) was discussed in *In re The Board of Commerce Act*, 1919, *and The Combines and Fair Prices Act*, 1919 (3), and in *Toronto Electric Commissioners* v. *Snider* (4), where the view was expressed that the Dominion could get authority to act only in cases of emergency. If the main object of the Act in question is, as is submitted, to abate an evil which is a threat to the body politic of the Dominion, then, though it may affect subjects which are in the enumerated classes of s. 92, it is competently enacted. The danger to the body politic of the Dominion can arise from an internal situation just as it can from a foreign enemy or other external menace. [Reference was made to the four propositions stated by Lord Tomlin in *Attorney-General for Canada* v. *Attorney-General for British Columbia* (5), and to *In re the Regulation and Control of Aeronautics in Canada* (6), and *In re the Regulation and Control of Radio Communication in Canada.* (7] This legislation is not something to attach statutory conditions to contracts of employment, it is legislation of Parliament assuming a burden as a function of government and dealing with that burden.

With regard to the facts which show the seriousness of the situation, the highest percentage of unemployed was 32·9, in March, 1933. By August, 1935, it was down to 17·4 per cent. Eleven per cent. was regarded by the statistical department as normal; but it was seasonal to some extent. Relief measures were adopted from 1930 to 1935, and the expenditure of the Dominion Government to relieve the unemployment situation during that period amounted to $192,291,683.

No Province could tax for the purpose of having the proceeds

(1) [1915] A. C. 330, 339.
(2) 7 App. Cas. 829, 838.
(3) [1922] 1 A. C. 191, 197, 200.
(4) [1925] A. C. 396, 410.
(5) [1930] A. C. 111, 118.
(6) [1932] A. C. 54, 71.
(7) [1932] A. C. 304, 311.

go into a Federal fund, and here there was a need for a national fund. This matter transcends property and civil rights in the Province, and the legislation should be held intra vires of the Parliament of Canada. There is more material before the Board indicative of necessity than was the case in *Russell* v. *The Queen.* (1)

A. W. Roebuck K.C., Attorney-General for Ontario, and *I. A. Humphries K.C.* for the Attorney-General for Ontario. Ontario does not take quite the same view of all the matters as the Dominion takes. Ontario desires to support this Act, however, because it is felt that it is in the public interest both in the Provinces and in the Dominion as a whole. Ontario's attitude, therefore, is that it is desirable to find means, if that is possible within the four corners of the constitution, by which the Act may be supported as a matter within Dominion jurisdiction. It is submitted that the legislation is within the overriding power of the opening words of s. 91, and is also within the residuary power—in a sense there is a distinction between those two. It comes within the overriding power of s. 91 taking things of extraordinary importance out of the local and private provisions of s. 92. No statistics can show the great extent of human suffering brought about by the economic position in Canada in recent years. Such a condition of affairs endangers the State. The following authorities seem to support in the main the contention as to the power of the Dominion to legislate in matters of sufficient national importance and to withdraw them from Provincial control : *Attorney-General for Canada* v. *Attorney-General for Alberta* (2) ; *In re The Board of Commerce Act*, 1919, *and The Combines and Fair Prices Act*, 1919 (3) ; *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*(4) ; *Toronto Electric Commissioners* v. *Snider* (5) and *In re The Regulation and Control of Aeronautics in Canada.* (6)

If there is not sufficient evidence before the Board justifying this legislation under the overriding power of the Dominion

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(1) 7 App. Cas. 829.
(2) [1916] 1 A. C. 588.
(3) [1922] 1 A. C. 191.
(4) [1923] A. C. 695.
(5) [1925] A. C. 396.
(6) [1932] A. C. 54.

Government, it is next submitted that the employment scheme as set up in this Act is not within head 13 of s. 92 of the British North America Act—"property and civil rights in the Province"—because the scope of the legislation is Dominion wide. It is not a question of competing legislation. A subject of nation wide legislation may and does incidentally affect the Provinces. The scheme of insurance being nation wide and not possible of enactment in the Provinces, it is not civil rights in the Province at all.

With regard to the Dominion right of taxation, it is not conceded that the Dominion may tax everything everywhere and that the Provinces are left solely to what is left, but no objection is taken by Ontario to this particular taxation for this particular purpose.

J. B. McNair K.C., Attorney-General for New Brunswick, and *Frank Gahan* for the Attorney-General for New Brunswick.

Frank Gahan. There are three separate answers to the point of national emergency. First, all these matters were strenuously urged before the Supreme Court of Canada, and the six judges have found that the suggested emergency did not exist. It is submitted that this Board, on the same evidence, will hesitate to find that an emergency existed in Canada. Secondly, the Act by its very terms shows that it is not directed to an emergency. The frame of the Act is not designed immediately to deal with a national peril, because by s. 20, sub-s. 1, it is a condition of receiving any benefit under the Act that a person should have been in employment for forty weeks within the two years preceding. [Reference was also made to ss. 48; 23, sub-ss. 1, 2; s. 24, sub-s. 1 (*b*).] Thirdly, the evidence adduced is conclusive against this Act having been passed in respect of a national emergency: properly examined, it supports the view of the Supreme Court that no such emergency existed.

The answer to the argument that because there is a situation which extends throughout the nation requiring remedial measures it is a matter which does not fall within s. 92 is that according to the authorities the Dominion legislation must never encroach on the Provincial fields. It has never been suggested, unless the *Aeronautics* case (1) can be considered an exception, that, because legislation is framed to apply throughout the Dominion, therefore the subject-matter became a Dominion subject. The fact that the scheme could not be worked except on a Dominion basis has not been the test whether legislation is valid. The mere fact of convenience or greater efficiency cannot take the matter out of s. 92. [Reference was made to *Russell* v. *The Queen*. (2)] There is no reason why, with co-operation, this scheme should not be put into force. In the case of the Old Age Pensions Act, R. S. C. 1927, c. 156, the Dominion contributed 75 per cent. of the cost, and no one doubted that that was valid legislation. There would be no difficulty, by co-operation, in having such a scheme as that provided by the present Act without infringing Provincial rights. This is an Act relating to civil rights in the Province, and that position cannot be affected by the fact that the Dominion fund is contributing to the benefit that a person is to receive by virtue of his contract of employment. When the Act in question is examined it is purely an Act providing for compulsory insurance, and although the Minister of Finance of the Dominion is the conduit pipe through which the contributions flow into the fund, yet in fact the Act is creating a corporation which, although subsidized by the Dominion, is conducting an insurance business. It is in every way treated as a matter of civil liability.

The employment service provided by Part II. of the Act is largely and necessarily local, and with the exception of s. 14, sub-s. 4, is obviously dealing with local matters. This Act is proposing a scheme of compulsory insurance which is within property and civil rights in the Province, and is not valid legislation of the Dominion Parliament.

St. Laurent K.C. replied. Is this legislation in relation to property and civil rights in the Province within the meaning of those words in head 13 of s. 92, or is it in pith and substance legislation in relation to a problem which did not exist when the British North America Act was framed, and which was not specially provided for in any of the enumerated heads

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(1) [1932] A. C. 54.

(2) 7 App. Cas. 829.

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of ss. 91 and 92? It is submitted that it is the latter, and therefore a matter with respect to which legislative jurisdiction must be found in one or other of the residuary classes of ss. 91 and 92. It is not in pith and substance in relation to anything enumerated in the first 15 heads of s. 92, and therefore being something concerned with peace, order and good government in Canada is either within the general words of s. 91 or, if it is merely local and private within the Province, it is within the words of head 16 of s. 92. [Reference was made to *John Deere Plow Co., Ld.* v. *Wharton.* (1)] The legislation in its main purpose is not dealing with property and civil rights, but is dealing with something which must affect property and civil rights, but that is not the pith and substance of the matter which concerned the Legislature in enacting the Act. In the *Radio* case (2) Canada found itself bound to a foreign power in respect of something which was not provided for in either s. 91 or s. 92, but it had to be found somewhere in the British North America Act. The present matter was not an "emergency" in the sense in which that word is used in the *Board of Commerce* case (3) or the *Fort Frances* case (4); it involved a new function of government which circumstances forced on the Government of Canada. Does it make any difference that the fund, instead of being raised by general taxation of the whole of the Canadian taxpayers, is as to a portion of it raised by compulsory levies from employers and employees? If it is taxation then Parliament has the right to use any mode or form of taxation.

1937. Jan. 28. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from the judgment of the Supreme Court, delivered on June 17, 1936, in the matter of a reference by the Governor-General in Council, dated November 5, 1935, asking whether the Employment and Social Insurance Act, 1935, was ultra vires of the Parliament of Canada. The majority of the Supreme Court, Rinfret, Cannon, Crocket and Kerwin JJ., answered the question in

(1) [1915] A. C. 330.
(2) [1932] A. C. 304.
(3) [1922] 1 A. C. 191.
(4) [1923] A. C. 695.

the affirmative, the Chief Justice and Davis J. dissenting. The Act in its preamble recited art. 23 of the Treaty of Peace, by which in the Covenant of the League of Nations the members of the League agreed that they would endeavour to maintain fair and humane conditions of labour (omitting, however, in the recital that this agreement was subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed), and art. 427 of the said treaty, by which it was declared that the well-being, physical, moral and intellectual, of industrial wage earners was of supreme international importance. It then recited that it was desirable to discharge the obligations to Canadian labour assumed under the provisions of the said treaty: and that it was essential for the peace, order and good government of Canada to provide for a national employment service and insurance against unemployment, etc. It consists of five Parts, Employment and Social Insurance Commission (ss. 4-9), Employment Service (ss. 10-14), Unemployment Insurance (ss. 15-38), National Health (ss. 39-41) and General (ss. 42-48). In substance the Act provides for a system of compulsory unemployment insurance. Part I. sets up a commission charged with administering the Act and obtaining information and making proposals to the Governor in Council for making provision for the assistance of persons during unemployment who would not be entitled to unemployment insurance benefit under Part III. Part II. provides for the organization by the commission of employment offices similar to the labour exchanges in the United Kingdom. Part III. provides for unemployment insurance, while Part IV. merely provides that the commission shall co-operate with other authorities in the Dominion or Provinces, and shall collect information concerning any plan for providing medical care or compensation in cases of ill-health. Part V. provides for regulations and reports. There are three schedules. The first defines employment within the meaning of Part III., and excepted employments, which include employment in agriculture and forestry, in fishing, and in lumbering and logging. The second enacts the weekly rates of contribution, and rules as to payment and recovery of contributions paid by employers on behalf of employed persons. The third enacts the rates of unemployment benefit, and supplementary provisions concerning the payment of unemployment benefit.

The substance of the Act is contained in the sections constituting Part III. They set up a now familiar system of unemployment insurance under which persons engaged in employment as defined in the Act are insured against unemployment. The funds required for making the necessary payments are to be provided partly from money provided by Parliament, partly from contributions by employed persons, and partly from contributions by the employers of those persons. The two sets of contributions are to be paid by revenue stamps. Every employed person and every employer is to be liable to pay contributions in accordance with the provisions of the second schedule, the employer being liable to pay both contributions in the first instance, recovering the employed person's share by deduction from his wages, or, if necessary, in certain cases by action.

There can be no doubt that, prima facie, provisions as to insurance of this kind, especially where they affect the contract of employment, fall within the class of property and civil rights in the Province, and would be within the exclusive competence of the Provincial Legislature. It was sought, however, to justify the validity of Dominion legislation on grounds which their Lordships on consideration feel compelled to reject. Counsel did not seek to uphold the legislation on the ground of the treaty-making power. There was no treaty or labour convention which imposed any obligation upon Canada to pass this legislation, and the decision on this question in the reference on the three labour Acts does not apply. A strong appeal, however, was made on the ground of the special importance of unemployment insurance in Canada at the time of, and for some time previous to, the passing of the Act. On this point it becomes unnecessary to do more than to refer to the judgment of this Board in the reference on the three labour Acts, and to the judgment of the Chief Justice in the Natural Products Marketing Act which, on this matter, the Board have approved and adopted.

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It is sufficient to say that the present Act does not purport to deal with any special emergency. It founds itself in the preamble on general world-wide conditions referred to in the Treaty of Peace: it is an Act whose operation is intended to be permanent: and there is agreement between all the members of the Supreme Court that it could not be supported upon the suggested existence of any special emergency. Their Lordships find themselves unable to differ from this view.

It only remains to deal with the argument which found favour with the Chief Justice and Davis J., that the legislation can be supported under the enumerated heads, 1 and 3 of s. 91 of the British North America Act, 1867: (1.) The public debt and property, namely (3.) The raising of money by any mode or system of taxation. Shortly stated, the argument is that the obligation imposed upon employers and persons employed is a mode of taxation: that the money so raised becomes public property, and that the Dominion have then complete legislative authority to direct that the money so raised, together with assistance from money raised by general taxation, shall be applied in forming an insurance fund and generally in accordance with the provisions of the Act.

That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied. Whether in such an Act as the present compulsion applied to an employed person to make a contribution to an insurance fund out of which he will receive benefit for a period proportionate to the number of his contributions is in fact taxation it is not necessary finally to decide. It might seem difficult to discern how it differs from a form of compulsory insurance, or what the difference is between a statutory obligation to pay insurance premiums to the State or to an insurance company. But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

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It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain. In the present case, their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid. The other parts of the Act are so inextricably mixed up with the insurance provisions of Part III. that it is impossible to sever them. It seems obvious, also, that in its truncated form, apart from Part III., the Act would never have come into existence. It follows that the whole Act must be pronounced ultra vires, and in accordance with the view of the majority of the Supreme Court their Lordships will humbly advise His Majesty that this appeal be dismissed.

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Attorneys-General for Ontario and New Brunswick: *Blake & Redden.*

[PRIVY COUNCIL.]

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ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . APPELLANT;

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ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Criminal Code—Additional section—Specified trade practices made indictable offences—Constitutional validity—Criterion of "wrongness"—Prohibition of act in public interest—Criminal law not used as pretext to invade Provincial legislative field—Not legislation in pith and substance only interfering with civil rights in the Province—Section valid Dominion legislation—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *s.* 91 (2) (27)—*An Act to Amend the Criminal Code,* 1935, *St. Can.* (25 & 26 *Geo.* 5, *c.* 56), *s.* 9.

Sect. 498A of the Criminal Code of Canada, which was introduced into the Code by s. 9 of an Act to Amend the Criminal Code (25 & 26 Geo. 5, c. 56), provided that:—

"Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a penalty not exceeding one thousand dollars or to one month's imprisonment, or, if a corporation, to a penalty not exceeding five thousand dollars, who

(*a*) is a party or privy to, or assists in, any transaction of sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

(*b*) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;

(*c*) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor" :—

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* *Present;* LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT M.R., and SIR SIDNEY ROWLATT.

Held, that the section was in toto intra vires of the Parliament of Canada under s. 91, head 27, of the British North America Act, 1867,—"The Criminal Law, ..." There was no reason for supposing that the Dominion were using the criminal law as a pretence or pretext for invading the Provincial legislative field, or that the legislation was in pith and substance only interfering with civil rights in the Province.

The only limitation on the plenary power of the Dominion to determine what should or should not be criminal was the condition that Parliament should not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92 of the British North America Act. It was no objection that it did in fact affect them, for if it was a genuine attempt to amend the criminal law it might obviously affect previously existing civil rights.

There was no other criterion of "wrongness" than the intention of the Legislature in the public interest to prohibit the act or omission made criminal.

Proprietary Articles Trade Association v. *Attorney-General for Canada* [1931] A. C. 310 applied.

There seemed to be nothing to prevent the Dominion, if it thought fit in the public interest, from applying the criminal law generally to acts and omissions which so far were only covered by Provincial enactments.

Judgment of the Supreme Court of Canada [1936] Can. S. C. R. 363 affirmed.

APPEAL (No. 102 of 1936), by special leave, from a judgment of the Supreme Court of Canada (June 17, 1936) answering the following question referred to the Court by Order of the Governor-General in Council, dated November 5, 1935 :—"Is s. 498A of the Criminal Code, or any or what part or parts of the said section ultra vires of the Parliament of Canada ?"

The Supreme Court of Canada (Duff C.J., Rinfret, Cannon, Crocket, Davis and Kerwin JJ.) unanimously held that sub-ss. (*b*) and (*c*) of s. 498A were not ultra vires ; and by a majority (Cannon and Crocket JJ. dissenting) held that sub-s. (*a*) was also not ultra vires. The judgments of the Supreme Court are reported at [1936] Can. S. C. R. 363.

1936. Nov. 9, 10. *J. W. de B. Farris K.C.* for the Attorney-General for British Columbia. I propose to deal first with sub-s. (*a*), because all the Provinces are more concerned with the principle than with the immediate effect of sub-ss. (*b*)

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and (*c*), and if the principle is established in sub-s. (*a*) it becomes a secondary consideration whether it applies equally to sub-ss. (*b*) and (*c*), but it is submitted that it does. Sub-sect. (*a*) is an invasion of the field of Provincial rights and is not criminal law in the proper sense of the words. The amendment of the Code was to give effect to recommendations in the Report of the Royal Commission on Price Spreads. The Report of the Royal Commission on Price Spreads had nothing to do with criminal law at all; it was a document dealing with trade practices: the Commission was one whose problem was entirely that of investigating and making representations in regard to trade practices in Canada. The legislation deals with "Property and civil rights in the Province"—the subject of head 13 of s. 92 of the British North America Act. A test for determining the character of legislation also laid down in various other cases appears in *Toronto Electric Commissioners* v. *Snider.* (1) This legislation must be considered not merely in the form in which it appears, but in its pith and substance; it is really subject-matter affecting property and civil rights. It does not come within s. 92, head 16—" matters of a merely local or private nature in the Province "—but in head 13, supplemented by head 15—" the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." Taking those two headings, 13 and 15, and looking at the language of s. 498A, it is submitted that this enactment could have been passed by any Province in Canada in relation to any business carried on in that Province. This is unquestionably legislation within property and civil rights: *City of Montreal* v. *Montreal Street Railway* (2); *Attorney-General for Canada* v. *Attorney-General for Alberta* (3); *In re The Board of Commerce Act*, 1919, *and The Combines and Fair Prices Act*, 1919 (4); *Toronto Ry. Co.* v. *Toronto City* (5); and *Hodge* v. *The Queen.* (6)

(1) [1925] A. C. 396, 406.
(2) [1912] A. C. 333, 343.
(3) [1916] 1 A. C. 588, 597.
(4) [1922] 1 A. C. 191, 197.
(5) [1920] A. C. 446, 452.
(6) (1883) 9 App. Cas. 117, 130.

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If at any time the Parliament of Canada could show that these trade practices had become such an abuse that they imperilled the national business life of Canada, and so created an emergency comparable to war or pestilence, then without doubt the Dominion Parliament could legislate under peace, order and good government on the theory that the matter so transcended Provincial powers that it really created an exception.

[LORD ATKIN : An emergency is not required for criminal law at all. The momentous question is whether this is fairly within the scope of criminal law.]

The Attorney-General for Canada contends that " criminal law " as used in head 27 of s. 91 of the British North America Act means " the criminal law in its widest sense " : *Attorney-General for Ontario* v. *Hamilton Street Railway Co.* (1) ; and he also relies in his case on the judgment in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (2), where the power of the Dominion to legislate in relation to matters falling within the class of subjects " the Criminal law . . . . including the procedure in criminal matters " was discussed. Neither of those two cases can possibly be supported in the wide way in which they have been interpreted in the factum of the Attorney-General for Canada. In the *Hamilton Street Railway* case (1) there was no such problem as arises in the present case. The judgment in the *Proprietary Articles Trade Association* case (2) as well as that in the *Hamilton Street Railway* case (1) must be read with limitations : it must be borne in mind that what is being considered in the present case is not a test of criminal law as it would be understood in a definition of that form of legislation, but criminal law as it must be understood in s. 91 (27). There must be a field of criminal law in its widest definition that is provincial : *Rex* v. *Nat Bell Liquors, Ld.* (3) Whatever be the true test, criminal law must involve some idea of moral wrong or guilt.

It is submitted that it has been established, first, that this

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(1) [1903] A. C. 524, 528.

(2) [1931] A. C. 310.

(3) [1922] 2 A. C. 128, 168.

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legislation if limited to the Provinces would be competent to them; secondly, that the Dominion by extending the legislation to all the Provinces cannot change the nature of the subject; and, thirdly, that criminal law in s. 91 (27) is not used in the widest sense in which criminal law may be defined. The scheme of s. 498A in the first place is to prevent the middleman having an advantage over his competing middleman, and that is a matter which the Provinces before the date of this legislation had full jurisdiction to deal with as being the regulation of trade in its local aspects. In substance, if not in form, the legislation is a direct invasion of property and civil rights, and therefore the burden is on the Dominion to show that it is really criminal law: *L'Union St. Jacques de Montreal* v. *Bélisle.* (1) This subject-matter did not become criminal law until the Dominion had so legislated: until it was criminal law the Dominion had no jurisdiction, therefore the Dominion could not acquire jurisdiction by legislation not competent to the Dominion until the jurisdiction had been acquired. This legislation is an encroachment on the Provincial field, and the Dominion have passed it as the only available method of regulating what they desired to regulate.

In the following authorities the Dominion power of legislation was limited to cases in which the evil had become so great that it could be dealt with under the general powers for the peace, order and good government: *City of Montreal* v. *Montreal Street Railway* (2); the *Board of Commerce* case (3); *Toronto Electric Commissioners* v. *Snider* (4); and the *Proprietary Articles Trade Association* case (5). My complaint is limited to cases which hitherto have not been criminal law, and are only made a new crime in connection with the subject-matter of property and civil rights. With regard to sub-ss. (*b*) and (*c*), and the mere fact that they deal with combinations, etc., there is nothing in those words which is against public interests.

(1) (1874) L. R. 6 P. C. 31, 35–6.
(2) [1912] A. C. 333, 344.
(3) [1922] 1 A. C. 191, 197.
(4) [1925] A. C. 396, 407, 409–10.
(5) [1931] A. C. 310.

A. W. Roebuck K.C., A.-G. for Ontario, and *I. A. Humphries K.C.* for the Attorney-General for Ontario. Ontario is passive with regard to sub-ss. (*b*) and (*c*): they appear to be unimportant, and the Province is not much concerned about them. It is felt, however, that they do come within criminal law—nearer to it than does sub-s. (*a*)—because there are evidenced in them the general characteristics of criminal law. In a sense we support sub-ss. (*b*) and (*c*), but we are very much opposed to sub-s. (*a*), not that it has a very great economic effect, but it violates the very fundamentals of our constitution and will, if held to be valid, set a precedent for this type of legislation. From the standpoint of criminal law there is practically no substance in it; from the standpoint of property and civil rights there is so much that in pith and substance it falls within the latter class. In the Act it is not so much the substance but rather the form of the transaction that is being regulated. There is nothing in sub-s. (*a*) which suggests in any degree that it is either excessive or contrary to the public interest. It is as far away from our conception of criminal law as anything can be, but as a regulation of trade it is directly in point. It says that commercial transactions, and particularly businesses, shall be carried on in particular ways. The purpose of this legislation is with regard to the regulation of contracts rather than to the very strained and doubtful regard of the public interest such as constitutes criminal law. [Reference was made to the *Board of Commerce* case (1); *Attorney-General for Canada* v. *Attorney-General for Alberta* (2); *Attorney-General for Ontario* v. *Reciprocal Insurers* (3); *Toronto Electric Commissioners* v. *Snider* (4); and *Reference re Validity of the Combines Investigation Act and of s.* 498 *of the Criminal Code.* (5)] The Act considered in the *Proprietary Articles Trade Association* case (6) and that now being dealt with are utterly different. *In re Insurance Act of Canada* (7) does not add much to the *Reciprocal Insurers* case. (3)

(1) [1922] 1 A. C. 191, 197.
(2) [1916] 1 A. C. 588, 595.
(3) [1924] A. C. 328, 337.
(4) [1925] A. C. 396, 402, 403.
(5) [1929] Can. S. C. R. 409, 412.
(6) [1931] A. C. 310, 323.
(7) [1932] A. C. 41.

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J. B. McNair K.C., A.-G. for New Brunswick, and *Frank Gahan* for the Attorney-General for New Brunswick: New Brunswick takes up the identical attitude of British Columbia. [Reference was made to passages in the Report of the Royal Commission on Price Spreads.]

R. S. Robertson K.C., L. S. St. Laurent K.C., C. P. Plaxton K.C., Peter Wright and *R. St. Laurent* for the Attorney-General for Canada. The section in question is valid Dominion legislation under head 27 of s. 91 of the British North America Act—"The Criminal law." It has been contended that the jurisdiction given to the Dominion by s. 91 (27) does not cover criminal law in its widest sense, as those words were used by this Board in the *Proprietary Articles Trade Association* case (1): and it has been said that if the legislation affects property and civil rights then it is beyond the competence of Parliament. That, it is submitted, is covered by what was said in the *Proprietary Articles Trade Association* case (1), and it is also covered by the words in s. 91 that "it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated"; and "Criminal law" is one of them. Sect. 498A is of similar character to portions of s. 508 of the Criminal Code, which deals with "Insurance offences." The appellant contends that this is something else disguised as criminal law, and that it is not good criminal law; in support of that view he relies on the *Reciprocal Insurers* case (2), the *Board of Commerce* case (3), and the *Snider* case (4). The significant feature of all those cases is that the penal clauses were in each case merely ancillary to another purpose. The present legislation is not ancillary to anything else; it is all here in this one section; there is no other purpose to be carried out. It is to prohibit the conduct referred to and to punish those who commit such conduct. There is no basis here for the contention that was set up in the other cases. It is quite impossible to say that there are not

(1) [1931] A. C. 310, 323.
(2) [1924] A. C. 328.
(3) [1922] 1 A. C. 191.
(4) [1925] A. C. 396.

cases which come well within sub-s. (*a*), so that it has an application : if it operates at all it operates as criminal law and nothing else.

There was no reply.

1937. Jan. 28. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from a judgment of the Supreme Court of Canada, delivered on June 17, 1936, on a reference by the Governor-General in Council, dated November 5, 1935, raising the question whether s. 498A of the Criminal Code is ultra vires of the Parliament of Canada. The Supreme Court unanimously held that sub-ss. (*b*) and (*c*) were not ultra vires, and by a majority, the Chief Justice, Rinfret, Davis and Kerwin JJ., Cannon and Crocket JJ. dissenting, held that sub-s. (*a*) also was not ultra vires. Sect. 498A was introduced into the Criminal Code by s. 9 of 25 & 26 Geo. 5, c. 56, the title of which is "An Act to Amend the Criminal Code."

[His Lordship read s. 9, and continued :] Their Lordships agree with the Chief Justice that this case is covered by the decision of the Judical Committee in the *Proprietary Articles* case. (1) The decision in that case seems to be inconsistent with the ground of dissent of Crocket J. that sub-s. (*a*) lacks "the characteristic feature of crime, viz., the intent to do wrong." The basis of that decision is that there is no other criterion of "wrongness" than the intention of the Legislature in the public interest to prohibit the act or omission made criminal. Cannon J. was of opinion that the prohibition cannot have been made in the public interest because it has in view only the protection of the individual competitors of the vendor. This appears to narrow unduly the discretion of the Dominion Legislature in considering the public interest. The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92. It is no objection that it does in fact affect them. If a genuine

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(1) [1931] A. C. 310.

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attempt to amend the criminal law, it may obviously affect previously existing civil rights. The object of an amendment of the criminal law as a rule is to deprive the citizen of the right to do that which, apart from the amendment, he could lawfully do. No doubt the plenary power given by s. 91 (27) does not deprive the Provinces of their right under s. 92 (15) of affixing penal sanctions to their own competent legislation. On the other hand, there seems to be nothing to prevent the Dominion, if it thinks fit in the public interest, from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments. In the present case there seems to be no reason for supposing that the Dominion are using the criminal law as a pretence or pretext, or that the legislature is in pith and substance only interfering with civil rights in the Province. Counsel for New Brunswick called the attention of the Board to the Report of the Royal Commission on Price Spreads, which is referred to in the order of reference. It probably would not be contended that the statement of the Minister in the order of reference that the section was enacted to give effect to the recommendations of the Royal Commission bound the Provinces or must necessarily be treated as conclusive by the Board. But when the suggestion is made that the legislation was not in truth criminal legislation, but was in substance merely an encroachment on the Provincial field, the existence of the report appears to be a material circumstance. Their Lordships are in agreement with the decision of the majority of the Supreme Court. They are of opinion that no part of the section is ultra vires: and they will humbly advise His Majesty that this appeal should be dismissed.

Solicitors for the Attorney-General for British Columbia: *Gard, Lyell & Co.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Attorneys-General for Ontario and New Brunswick: *Blake & Redden.*

Applied. CANADIAN FED. OF AGRICULTURE v. ATT.-GEN. FOR QUEBEC [1951] A. C. 179

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ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Dominion Statute—Constitutional validity—Natural products marketing legislation—Powers of Marketing Board—Regulation of transactions completed in the Province—" Property and civil rights in the Province" affected—Legislation invalid—Provisions not severable—British North America Act, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91 (2); *s.* 92 (13)—*Natural Products Marketing Act,* 1934, *St. Can.* (24 *&* 25 *Geo.* 5, *c.* 57)—*Natural Products Marketing Act Amendment Act,* 1935, *St. Can.* (25 *&* 26 *Geo.* 5, *c.* 64).

The Natural Products Marketing Act, 1934, of the Parliament of Canada, as amended by the Natural Products Marketing Act Amendment Act, 1935, which provided (inter alia) for the establishment of a Dominion Marketing Board whose powers included powers to regulate the time and place at which, and the agency through which, natural products to which an approved scheme related should be marketed, and to determine the manner of distribution, and the quantity, quality, grade or class of the product that should be marketed by any person at any time, was ultra vires of the Dominion Parliament.

The provisions of the Act, in addition to dealing with the regulation of foreign export and inter-Provincial trade, also covered transactions in any natural product which were completed within the Province and which had no connection with inter-Provincial or export trade. The regulation of " trade and commerce " by the Dominion under head 2 of s. 91 of the British North America Act, 1867, did not permit the regulation of individual forms of trade or commerce confined to the Province, and the legislation in question, therefore, in so far as it related to matters which were in substance local and Provincial and affected " property and civil rights," a subject-matter exclusively reserved to the Provincial Legislature under head 13 of s. 92 of the British North America Act, was beyond the competence of the Dominion Parliament.

The whole texture of the Act was inextricably interwoven and neither s. 9, which dealt with inter-Provincial or export

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT M.R., and SIR SIDNEY ROWLATT.

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trade, nor Part II., which was a genuine exercise of the Dominion legislative authority over criminal law, could be contemplated as existing independently of the main legislation and must fall with it as being in part merely ancillary to it.

Judgment of the Supreme Court of Canada [1936] Can. S. C. R. 398, affirmed.

Appeal (No. 103 of 1936), by special leave, from a judgment of the Supreme Court of Canada (June 17, 1936) answering the following question referred to the Court by Order of the Governor-General in Council, dated November 5, 1935: "Is the Natural Products Marketing Act, 1934, as amended by the Natural Products Marketing Act Amendment Act, 1935, or any of the provisions thereof and in what particular or particulars or to what extent, ultra vires of the Parliament of Canada?" The scheme of the Act is referred to in the judgment of the Judicial Committee.

The Supreme Court of Canada (Duff C.J., Rinfret, Cannon, Crocket, Davis and Kerwin JJ.) unanimously answered the question in the affirmative. The judgment of the Supreme Court is reported at [1936] Can. S. C. R. 398.

1936. Nov. 23, 24 and 26. *J. W. de B. Farris K.C.* and *Wilfrid Barton* for the Attorney-General for British Columbia. The Supreme Court unanimously held that the Act was ultra vires as a whole on the general grounds, first, that it did not come within "trade and commerce" as those words were used in s. 91 of the British North America Act, and secondly, that it did not come within peace, order and good government under s. 91. In effect, what the Chief Justice said was that so far as this Act dealt with inter-Provincial and international trade it was within Dominion jurisdiction; but he said that the trouble was that it also undertook to deal with trade in its purely local aspects as property and civil rights. It is submitted that there are really practical reasons why this legislation should be supported: it was obviously designed to fit in along with Provincial Acts in relation to marketing. Every Province of Canada did pass a Provincial Marketing Act expressly to dovetail in with the Federal Act. Experience in British Columbia showed that the two Acts were working

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in complete accord: the same Board could function in two capacities—both as a Federal and as a Provincial Board. As a matter of construction the Federal Act should be construed as relating only to Federal matters; and if this Board finds it necessary to construe the Act as invading the Provincial fields, it should be declared invalid only so far as it trenches on Provincial matters. [Reference was made to *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co., Ld.* (1), the legislation in question, and the Marketing Acts passed by the various Provinces, that of British Columbia being the Natural Products Marketing (British Columbia) Act, 1934 (24 Geo. 5, c. 38).] The only controversy is whether it is necessary to say that the whole Act must be void, or whether it is sufficient to say that the enactment in so far as it relates to matters local and Provincial is beyond the jurisdiction of Parliament: *In re The Initiative and Referendum Act* (2); *Great West Saddlery Co.* v. *The King* (3); *Attorney-General for Manitoba* v. *Attorney-General for Canada.* (4) The enactment is valid to the extent to which it is not in excess of the powers of the Dominion Parliament: *The King* v. *Vizzard; Ex parte Hill* (5), and *Willard* v. *Rawson.* (6) [Reference was also made to *Newcastle and Hunter River Steamship Co., Ld.* v. *Attorney-General for the Commonwealth.* (7)]

Wilfrid Barton followed. The powers given to the Board under s. 4, sub-s. 1, of the Act are in no sense absolute powers; they are given only to regulate natural products on a condition, that is, when the product has been declared a regulated product: and none of these powers come into operation until the field for their exercise has been declared. The regulated product is a product to which a scheme approved under this Act relates. There must therefore be a scheme before any of the powers of s. 4, sub-s. 1, come into operation.

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(1) [1914] A. C. 237.
(2) [1919] A. C. 935, 944.
(3) [1921] 2 A. C. 91, 124.
(4) [1925] A. C. 561, 567–8.
(5) (1933) 50 C. L. R. 30, 56, 70.
(6) (1933) 48 C. L. R. 316, 326.
(7) (1921) 29 C. L. R. 357, 368.

The provisions of the Act are clearly severable, as the Act provides in s. 26; they are provisions which apply to three different things—a scheme dealing with all products, which is bad; a scheme dealing with export products, which is entirely good; and a scheme dealing with inter-Provincial trade, which is likewise good. It is submitted, first, that with regard to all schemes operating within Dominion competence, that is, in matters of export and inter-Provincial trade, the Act is wholly good; and secondly, that where the Act has in toto been adopted by a Provincial Legislature it has behind it the whole combined force of the sovereignty of the Dominion and the Province, and is valid. The matters in s. 9 are severable. With regard to s. 22, the criminal section, that is plainly valid and within the competence of the Dominion.

R. S. Robertson K.C., *L. S. St. Laurent K.C.*, *C. P. Plaxton K.C.*, *Peter Wright* and *R. St. Laurent* for the Attorney-General for Canada. The Attorney-General for Canada is satisfied with the principles enunciated in the reasons for the judgment of the Chief Justice. He nevertheless supports the appeal, because it is submitted that the short answer given in the formal judgment really goes beyond the reasons expressed by the Chief Justice. The Chief Justice and his colleagues came to the conclusion that there was nothing of consequence in the statute beyond ss. 3, 4 and 5. If possible, the formal judgment should be amplified to the extent of having it really conform to the reasons for judgment enunciated in the Chief Justice's judgment. In view of s. 26, Part II. is clearly severable from Part I., and there is nothing in Part II., or in the reasons for judgment, which would entitle one to say that it was not valid legislation. The legislation is in substance concerned with the regulation of export and inter-Provincial trade and exerts control over local trade only as a necessary incident of effective regulation of export and inter-Provincial trade: the legislation is, therefore, legislation in relation to the regulation of trade and commerce under head 2 of s. 91 of the British North America Act. [On the question of the invalidity of certain Provincial Acts dealing with similar matters, reference was made to *Lawson* v. *Interior Tree Fruit*

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and Vegetable Committee of Direction (1) and *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ld.* (2)] Part II. of the present Act is a valid enactment, and is comparable with the enactment which was held to be valid in the *Proprietary Articles Trade Association Case* (3); and the provision in s. 22 is exactly similar to the provision in s. 32 of the Combines Investigation Act held to be valid in the last mentioned case. (3)

It has been repeatedly held that all powers proper for the self-administration of the Dominion and its Provinces were imparted to one or the other of the Legislatures, and that what was not in one was of necessity in the other. It would seem to be a reasonable construction of the powers of the two legislative authorities that having between them the whole of the powers they should be able to exercise them in such a way as is proper for the good administration of the inhabitants. *The King* v. *Eastern Terminal Elevator Co.* (4) can be distinguished. [Reference was also made to *Caron* v. *The King.* (5)] Even if s. 5 cannot be supported at all, s. 9 is clearly a valid enactment in relation to export and inter-Provincial trade. If ss. 5, 6, 7 and 8 were eliminated there would still remain the Board, its powers, and the scheme under s. 9. Sect. 12 is also severable; ss. 13, 14 and 15 are merely ancillary. Sects. 5, 6, 7 and 8 are the only ones which can possibly offend.

A. W. Roebuck K.C., A.-G. for Ontario, and *I. A. Humphries K.C.* for the Attorney-General for Ontario. If s. 9 stood by itself, with a definition of a regulated product, and the formation of the Board, with the marketing limited to export or inter-Provincial trade, there would not be much objection to it from the point of view of the Provinces. The Act, however, is undoubtedly an invasion of the Provincial field, and s. 9 cannot be severed from the Act as it is now before this Board. This Act being in its pith and substance one that regulates local trade within the Province, s. 9 is only a section to give colour, and the whole Act is ultra vires. The Act was dressed up in the guise of legislation dealing with export and inter-Provincial trade: s. 9 is merely an ancillary or incidental provision to the main object of the Act. The Parliament of Canada in purporting to legislate for export and inter-Provincial trade cannot regulate local trade within the Province and appropriate to itself a field in which it can exercise no legal authority.

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(1) [1931] Can. S. C. R. 357, 362, 365.
(2) [1933] A. C. 168, 176.
(3) [1931] A. C. 310.
(4) [1925] Can. S. C. R. 434.
(5) [1924] A. C. 999, 1003.

The appellant contends that in view of the provisions of s. 26 as a matter of construction the Act should be construed as relating only to Federal matters, and that they can be severed, so that that part of the Act which relates to Federal jurisdiction should remain. It is submitted that irrespective of any declaration of intention such as is contained in s. 26, it is for the Court to determine whether the Act is severable or not having regard to the whole Act and its main features and its real essence. Sect. 26 is simply a declaration of good intentions, and such a declaration expressed in an Act does not bind the Court. In the Australian cases which have been referred to the sections which were severable were sections which could properly be severed. [Reference was made to *The King* v. *Eastern Terminal Elevator Co.* (1) and *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction.* (2)] This was an Act designed for the purpose of invading the Provincial field, and to regulate men and companies in commercial business in the Provinces, and it was then dressed up by putting in s. 9. The whole Act is ultra vires. Sect. 22 of the Act is already on the Statute Book under s. 498A of the Criminal Code: Part II. is interwoven with Part I., which is the main portion of the Act regulating trade within the Province, and is ancillary to it.

Gustave Monette K.C. for the Attorney-General for Quebec. The Act does not regulate anything, it delegates the power to a Board to regulate. There are no general rules in the Act applicable to trade as such, nor to export or inter-Provincial trade. The main objects of the Act were, first, to regulate one product at a time, and secondly, to regulate the minor details of products without any distinction. [Reference was made to s. 5, sub-s. 4 (*a*), (*b*), (*d*) and (*f*).] The pith and substance of the Act is found in s. 4, sub-s. 1 (*a*), to regulate the minor details of trade locally, and in so regulating it there appears to be no rule of general concern with regard to inter-Provincial or export trade. The provisions which deal genuinely with inter-Provincial trade are ancillary: ss. 9, 11. The main feature about the local Board is that it comes under s. 4, sub-s. 2, and it is a local Board which is being created under a scheme, and the scheme comes from s. 5. If s. 5 goes, then the local Board goes.

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(1) [1925] Can. S. C. R. 434, 446. (2) [1931] Can. S. C. R. 357, 371.

On the question of severance: first, the principle is that this Board (the Judicial Committee) is not to amend the legislation; secondly, in applying the rule of severance care should be taken not to change the meaning, for if one section is taken away it may well be that the meaning of the rest is changed. The most that can be derived from s. 26 is that there is there a declaration that Parliament would probably have enacted separately such sections as would be found separately to be legal. But such a declaration must be treated with caution. It is submitted that Part II. is ancillary and is not severable; it comes within s. 92 (15) of the British North America Act. Canada in her Case has admitted that Part II. is ancillary, and their admission is binding on them. The pith and substance of Part II. is to provide a helpful function to Part I. in making it a crime for the intermediary to make an excessive spread. The investigation powers in s. 17 in Part II. are also intended solely to be helpful to Part I. Mr. St. Laurent said that the power to pass the Act in question now belongs to the Dominion under their power to legislate in respect of the criminal law, and that it is for the Dominion and not for the Province to regulate a combine. That is fallacious, because the power to make a crime does not import the power to regulate. As to the possibility of arriving at a general scheme of marketing, a Federal Act could be passed dealing with export and inter-Provincial trade, and the Provinces could pass one dealing with matters of Provincial concern, and there could be power in each to delegate powers to the other's Board. Quebec does not want its local trade to be regulated by the Dominion.

J. B. McNair K.C., A.-G. for New Brunswick, and *Frank Gahan* for the Attorney-General for New Brunswick. New Brunswick realizes the difficulty in framing marketing schemes, and has in this case passed an Act intended to co-operate with the Dominion Act. The Act has never come into operation. Quebec has taken up the same attitude, and I adopt the argument of Mr. Monette. The question of co-operation with the Dominion has been considered in *City of Montreal* v. *Montreal Street Ry.* (1), and the inference to be drawn is that although co-operation is possible each legislative body must keep strictly to its own sphere. With regard to s. 26, the provisions here are distinguishable from the provisions in the Australian cases. In those cases the provision was that there was to be an enactment, but that it was not to operate in so far as its operation would be in violation of the provisions of the Constitution : *Newcastle and Hunter River Steamship Co., Ld.* v. *Attorney-General for the Commonwealth* (2) ; *Willard* v. *Rawson.* (3) In construing an Act of Parliament, with one possible exception, the rule as to severance would be the same as in construing private documents : *Attwood* v. *Lamont* (4)—the one qualification is that in restraint of trade cases the Courts do not seek to assist the contracting party who inserts too wide a restraint, whereas in construing a public Act the Courts would, if possible, uphold the validity. Applying that principle, the Supreme Court came to a right conclusion when they said that this was an Act for a coherent scheme. It is submitted that the whole Act constitutes one unit : if part is invalid then the whole Act is invalid.

J. W. de B. Farris K.C. replied. There is a very close analogy between the present case and the *Newcastle and Hunter River Steamship* case (2) on the facts and the issues which arose, and the language in the enactment in the latter case involved the same matter that is suggested here as the

(1) [1912] A. C. 333, 346.
(2) (1921) 29 C. L. R. 357, 369.
(3) (1933) 48 C. L. R. 316, 326.
(4) [1920] 3 K. B. 571, 593.

reason why there cannot be a severance. The Australian case is not only an authority, it is a demonstration—it has been done in that way in Australia. [Reference was made to the Navigation Act, 1913, Acts of the Commonwealth, vol. 12, s. 14.] It is conceded that s. 26 of the present Act and s. 2, sub-s. 2, of the Australian Act are in different words, but in their essentials they both lead to the same result. With regard to *Attwood* v. *Lamont* (1), first, if a covenant which is inseverable has in it an element of invalidity as against public policy, it necessarily follows that that covenant is invalid; secondly, a different principle applies in dealing with Acts of Parliament and private contracts. If s. 5 is blue-pencilled out of existence, the Minister can still formulate a scheme under s. 9, and provide in the scheme for a local Board. Sect. 4 is perfectly valid applied only to inter-Provincial and export trade. Provisions which might be considered only ancillary in the ordinary legislation are not necessarily only ancillary in view of the express provisions of s. 26.

1937. Jan. 28. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from the Supreme Court on a reference by the Governor-General in Council, dated November 5, 1935, raising the question whether the Natural Products Marketing Act, 1934, as amended by the Natural Products Marketing Act Amendment Act, 1935, is ultra vires of the Parliament of Canada. The Supreme Court unanimously answered the question in the affirmative.

The Act consists of two parts. The first provides for the establishment of a Dominion Marketing Board whose powers include powers to regulate the time and place at which, and the agency through which, natural products to which an approved scheme relates shall be marketed, and to determine the manner of distribution and the quantity, quality, grade or class of the product that shall be marketed by any person at any time, and to prohibit the marketing of any of the regulated products of any grade, quality or class.

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(1) [1920] 3 K. B. 571.

There are other regulatory powers which need not be further specified. A scheme to regulate the marketing of a natural product is initiated by a representative number of persons engaged in the production or marketing of the natural product. It can be referred by the appropriate Minister to the Board, and if they approve the scheme as submitted or amended by them, and it is further approved by the Minister, the Governor-General in Council may approve the scheme. It is essential that the Governor-General in Council shall be satisfied either that the principal market for the natural product is outside the Province of production, or that some part of the product produced may be exported. The latter provision makes it clear that the regulation may apply to marketing transactions in natural products which have nothing to do with foreign export or inter-Provincial trade. If the Minister is satisfied that trade and commerce in a natural product are injuriously affected by the absence of a scheme prepared as above he may himself propose a scheme for approval of the Governor in Council. The Governor in Council is given power by order or regulation to regulate or restrict importation into Canada of a natural product which enters Canada in competition with a regulated product : and to regulate or restrict the exportation from Canada of any natural product. Part II. contains provision for the appointment by the Minister of a Committee who may be entrusted with the duty of investigating all matters connected with the production or marketing of natural or regulated products for the purpose of ascertaining the charges made in distribution of a natural or regulated product. The receipt against the interest of the public of an excessive charge is made an indictable offence, and there are provisions for the trial of such offences.

There can be no doubt that the provisions of the Act cover transactions in any natural product which are completed within the Province, and have no connection with inter-Provincial or export trade. It is therefore plain that the Act purports to affect property and civil rights in the Province, and if not brought within one of the enumerated classes of subjects in s. 91 must be beyond the competence of the Dominion Legislature. It was sought to bring the Act within the class (2) of s. 91—namely, The Regulation of Trade and Commerce. Emphasis was laid upon those parts of the Act which deal with inter-Provincial and export trade. But the regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the Province. In his judgment the Chief Justice says (1): "The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and inter-provincial trade and committing the regulation of external and inter-provincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority: *The King* v. *Eastern Terminal Elevator Co.* (2)"

Their Lordships agree with this, and find it unnecessary to add anything. There was a further attempt to support the Act upon the general powers to legislate for the peace, order and good government of Canada. Their Lordships have already dealt with this matter in their previous judgments in this series and need not repeat what is there said. The judgment of the Chief Justice in this case is conclusive against the claim for validity on this ground. In the result, therefore, there is no answer to the contention that the Act in substance invades the Provincial field and is invalid. It was, however, urged before us that portions of the Act, notably s. 9 in the first Part, and the whole of Part II., are within the competence of Parliament. Sect. 9 because it only purports to deal with inter-Provincial or export trade; and Part II. because it goes no further than the similar provisions in the Combines Investigation Act, and is a genuine exercise of the Dominion legislative authority over criminal law. Reference

(1) [1936] Can. S. C. R. 412. (2) [1925] Can. S. C. R. 434.

was made to s. 26 of the Act, which is in these terms: "If it be found that Parliament has exceeded its powers in the enactment of one or more of the provisions of this Act, none of the other or remaining provisions of the Act shall therefore be held to be inoperative or ultra vires, but the latter provisions shall stand as if they had been originally enacted as separate and independent enactments and as the only provisions of the Act; the intention of Parliament being to give independent effect to the extent of its powers to every enactment and provision in this Act contained."

It is said that this is a plain indication of the intention of the Legislature to pass any portion of the Act which might be valid in itself, in however truncated form the whole Act is left after rejecting the other portions. Moreover, counsel for British Columbia urged the Board to make a declaration that it was only so far as authority was conferred on the Board to deal with local matters not necessarily ancillary to the main power that the Act was ultra vires, and that the validity of each scheme must be determined as matters arise under it. No such declaration was asked for from the Supreme Court. British Columbia did not even appear at the hearing in Canada: and there is no claim for such a declaration in the case filed before this Board. It is of special importance in constitutional questions that this Board should, if possible, have the assistance of the opinion of the members of the Supreme Court: and as a general rule the Board will not be prepared in such cases to entertain claims for relief which have never been formulated in the Dominion Court. In no event, therefore, would they have acceded to the request for such a declaration as mentioned above. It does appear that the question of severability was raised in the factums of the Dominion and Ontario, and their Lordships were told, and of course accept the statement, that this point was mentioned to the Supreme Court. It cannot, they think, have been emphasized, for the very careful judgment of the Court makes no mention of it. There appear to be two answers. In the first place, it appears to their Lordships that the whole texture of the Act is inextricably interwoven, and that neither s. 9 nor Part II. can be contemplated as existing independently of the provisions as to the creation of a Board and the regulation of products. There are no separate and independent enactments to which s. 26 could give a real existence. In the second place, both the Dominion and British Columbia in their Cases filed on this appeal assert that the sections now said to be severable are incidental and ancillary to the main legislation. Their Lordships are of opinion that this is true : and that as the main legislation is invalid as being in pith and substance an encroachment upon the Provincial rights the sections referred to must fall with it as being in part merely ancillary to it. This relieves them from the task of deciding whether they would have been justified, when dealing with constitutional issues of this importance, in giving effect to arguments inconsistent with the reasons formally put before the Board in the filed Cases of the respective parties.

The Board were given to understand that some of the Provinces attach much importance to the existence of marketing schemes such as might be set up under this legislation : and their attention was called to the existence of Provincial legislation setting up Provincial schemes for various Provincial products. It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other. In the present case their Lordships are unable to support the Dominion legislation as it stands. They will therefore humbly advise His Majesty that this appeal should be dismissed.

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ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* ATTORNEY-GENERAL FOR CANADA.

Solicitors for the Attorney-General for British Columbia: *Gard, Lyell & Co.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Attorneys-General for Ontario and New Brunswick: *Blake & Redden.*

Solicitors for the Attorney-General for Quebec: *Lawrence Jones & Co.*

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[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Dominion Statute—Constitutional validity—Farmers' creditors—Proposal for composition, extension of time, or scheme of arrangement—Powers of Board of Review—Legislation relating to "bankruptcy and insolvency"—Valid—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *s.* 91 (21); *s.* 92 (13) (16)—*Farmers' Creditors Arrangement Act*, 1934, *St. Can.* (24 & 25 *Geo.* 5, *c.* 53)—*Farmers' Creditors' Arrangement Act Amendment Act*, 1935, *St. Can.* (25 & 26 *Geo.* 5, *c.* 20).

By the Farmers' Creditors Arrangement Act, 1934, of the Parliament of Canada, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935, a procedure was provided whereby (inter alia) a farmer who was unable to meet his liabilities as they became due might make a proposal for a composition, extension of time or a scheme of arrangement to his creditors. If the proposal was not accepted by the creditors the matter was referred to a Board of Review to formulate a proposal. If the creditors or the debtor declined to approve the Board's proposal the Board might nevertheless confirm it, and it was thereupon binding on the creditors and the debtor:—

Held, that the Act was genuine legislation relating to "bankruptcy and insolvency" and was accordingly intra vires of the Dominion Parliament under s. 91, head 21, of the British North America Act, 1867.

The statutory conditions of insolvency which enabled a creditor or a debtor to invoke the aid of the bankruptcy laws, or the classes to which those laws applied, were not intended to be stereotyped under head 21 of s. 91 of the British North America Act so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regarded those matters.

Legislative provisions as to compositions, by which bankruptcy was avoided, but which assumed insolvency, were properly within the sphere of bankruptcy legislation.

In re Companies' Creditors Arrangement Act [1934] Can. S. C. R. 659 referred to.

Judgment of the Supreme Court of Canada [1936] Can. S. C. R. 384 affirmed.

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT M.R., and SIR SIDNEY ROWLATT.

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ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. ATTORNEY-GENERAL FOR CANADA.

APPEAL (No. 104 of 1936), by special leave, from a judgment of the Supreme Court of Canada (June 17, 1936) answering the following question referred to the Court by Order of the Governor-General in Council, dated November 18, 1935: "Is the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, ultra vires of the Parliament of Canada?" The Act provides a procedure whereby a farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or a scheme of arrangement to his creditors. If the proposal is accepted by the ordinary creditors and the secured creditors whose rights are affected concur, it is submitted to the Court for approval. If it is not accepted by the ordinary creditors, or if a secured creditor whose rights are affected by it does not concur, the matter is referred to a Board of Review to formulate a proposal. If the proposal is accepted by the creditors and approved by the Court, or if it is formulated by the Board of Review and is approved by the creditors and the debtor, or if, though not so approved, it is confirmed by the Board of Review, it shall be binding upon all the creditors and the debtor. The relevant sections of the Act are set out in the judgment of the Judicial Committee.

In the Supreme Court of Canada, Duff C.J., Rinfret, Crocket, Davis and Kerwin JJ. were of opinion that the Statute was intra vires: Cannon J. was of opinion that it was ultra vires, except s. 17, which he held was intra vires. The judgments of the Supreme Court are reported at [1936] Can. S. C. R. 384.

1936. Nov. 26, 27. *J. W. de B. Farris K.C.* and *Wilfrid Barton* for the Attorney-General for British Columbia. The effect of the Act has been upheld as bankruptcy legislation coming under head 21 of s. 91 of the British North America Act, 1867—"Bankruptcy and Insolvency." The submission of all the Provinces is the same, namely, that the Act is not in its pith and substance bankruptcy, but is colourable legislation. If it is bankruptcy legislation, then it involves the right to interfere incidentally with property and civil rights in the Province. If, on the other hand, it is not bankruptcy legislation as such, but is only colourable, then the matter undoubtedly comes within property and civil rights in the Province. The fundamental characteristic of bankruptcy and insolvency legislation is that it is designed in the interests of creditors as a class. It is to provide for the rateable distribution of the assets of the debtor among his creditors whether or not the debtor is willing. The present Act, on the contrary, has none of the characteristics of bankruptcy and insolvency legislation for the following reasons: (*a*) It is designed for the purpose of keeping the farmer on his farm, and not to distribute his assets. (*b*) It is not bankruptcy but the prevention of bankruptcy. (*c*) The proceedings of the Act are not in course of bankruptcy proceedings, but before such proceedings. (*d*) An act of bankruptcy is not the basis of the proceedings, but follows only thereafter in case of a failure to carry out a compromise under the Act. (*e*) The proposal of "compromise" so called is not an ancillary of bankruptcy proceedings, but antecedent to and independent thereof. (*f*) The essential proposal for a compromise is in its features not a voluntary arrangement but a compulsory arrangement imposed by a Board on the creditors. (*g*) Such a scheme is made with a view not of the creditors' welfare as a class, or to distribution among them. It is made to defeat distribution. It may be without regard to their interests and solely in the interests of the debtor and with a view to protecting the value of the farm. (*h*) The scheme is not for the protection of the creditors, but at their expense. (*i*) It deals not with the assets of the debtor for the benefit of the creditors, but with the assets of the creditors for the benefit of the debtor. (*j*) The references in the Act to the Dominion Bankruptcy Act are colourable and establish no substantial connection between the two enactments. (*k*) The scheme treats a subject-matter which in part in some aspects may be ancillary to bankruptcy and insolvency legislation as itself the principal or primary subject-matter of legislation. (*l*) It has no general relation to bankruptcy and insolvency but is special legislation relative to farmers, and is or may be restricted to certain Provinces. [Reference was made to the relevant provisions of the Dominion Bankruptcy Act, R. S. C. 1927, c. 11, and to the Act under consideration.] The Act sets up a new scheme which in its purpose is not to administer the farmer's property as the assets of his creditors, but to administer it in defiance of that. [Reference was made to *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1); *Croft* v. *Dunphy* (2); *Royal Bank of Canada* v. *Larue* (3); *L'Union St. Jacques de Montreal* v. *Bélisle* (4); and *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada.* (5)] If those authorities, which show that in all schemes of bankruptcy the basis of the scheme is the distribution of the assets of the debtor among the creditors, are sound, the present Act came in as an independent Act with its own recital for the purpose not to distribute the assets among creditors, but to prevent that in order to promote production in Canada by moneys taken from the secured creditors and given for the benefit of the farmer. [Reference was also made to *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (6); *Attorney-General for Alberta* v. *Attorney-General for Canada* (7); and *Cushing* v. *Dupuy*. (8)] It is the pith and substance of the Act which must be looked at in testing what it purports to do. In *Attorney-General for Ontario* v. *Reciprocal Insurers* (9) it was said that a Statute must be judged by its natural and reasonable effect: In *City of Halifax* v. *Fairbanks' Estate* (10) "it is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity." The

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(1) [1897] A. C. 231, 236.
(2) [1933] A. C. 156.
(3) [1928] A. C. 187, 196.
(4) (1874) L. R. 6 P. C. 31, 36.
(5) [1894] A. C. 189.
(6) [1898] A. C. 700, 715.
(7) [1928] A. C. 475, 486.
(8) (1880) 5 App. Cas. 409, 415.
(9) [1924] A. C. 328, 339.
(10) [1928] A. C. 117, 126.

Dominion of Canada does not acquire jurisdiction in regard to property and civil rights of the farmers merely because they are unable to pay their obligations as they arise: the Dominion can only deal with the farmer in that connection in the limited field of bankruptcy. It is not claimed that legislation must conform to what was bankruptcy at federation: it is not contended that matters not strictly bankruptcy legislation may not be included as ancillary or necessarily incidental. Legislation which is the antithesis of bankruptcy, however, such as the present, cannot be ancillary, and still remains within the field of the Province. There is no severable clause in the Act and the legislation is bad in toto. [Reference was made to *In re Silver Brothers, Ld.*, (1), and *Brooks-Bidlake and Whittall, Ld.* v. *Attorney-General for British Columbia.* (2)]

Wilfrid Barton followed. The passages at p. 471 of Blackstone's Commentaries, vol. II., c. 31, dealing with "Bankruptcy," show the acid tests of bankruptcy and insolvency legislation. They are to deliver up the assets and the administration of them for the benefit of the creditors as a body. It does not follow that because there is a form of composition in this Act that that brings it into the sphere of bankruptcy; such forms of composition have existed even before bankruptcy. The pith and substance of this Act is to prevent bankruptcy in the case of a farmer. Then by exempting him from the purview of bankruptcy legislation he is at once put back into the domain of property and civil rights in which the Dominion may not interfere.

I. A. Humphries K.C. for the Attorney-General for Ontario. This legislation is not bankruptcy and insolvency: it may have the appearance of that type of legislation, but it is debt adjustment legislation, and it falls within property and civil rights within the Province. It is not really compromise legislation, but it is, as stated in the recital to the Act, to keep the farmer on the land. [Reference was made to *Ex parte Bischoffsheim. In re Aylmer* (3); *Lucas* v. *Martin* (4);

(1) [1932] A. C. 514, 520.
(2) [1923] A. C. 450, 456–7.
(3) (1887) 19 Q. B. D. 33.
(4) (1888) 37 Ch. D. 597, 607.

and *In re Webb. Ex parte Board of Trade.* (1)] With regard to the position of secured creditors, the bankruptcy legislation of Canada, which is very much on the same lines as the Imperial Bankruptcy Act of 1914, shows that the preservation of the rights of the secured creditors is contemplated. The present legislation shows that compromises and arrangements and schemes are contemplated and are provided for the purpose of preserving the rights not only of the debtor and the creditors, but for their mutual benefit: *Cushing* v. *Dupuy* (2); *Royal Bank of Canada* v. *Larue* (3); *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.* (4) A true compromise is an arrangement between parties by which each makes concessions to the other. The most common kind is one in which a creditor diminishes the amount of his security. The Chief Justice in this case said that "it is not open to dispute in this Court that legislation in respect of 'compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law'," and he referred to *In re Companies' Creditors Arrangements Act.* (5) The main element in that case is that there is a benefit to be derived for the general body of creditors upon arrangements being made on the consent of the majority properly approved by the Court.

What is the reasonable intent of the Act? What is its pith and substance? What is its aim and object? The Board of Review is the main teeth of the Act, and that Board can really make a new contract, and make a better bargain for the farmer. It is really debt adjustment and confiscatorial legislation dealing with subject matters which are entirely within the Province—property and civil rights.

R. S. Robertson K.C., *L. S. St. Laurent K.C.*, *C. P. Plaxton K.C.*, *Peter Wright* and *R. St. Laurent* for the Attorney-General for Canada, were not called upon.

1937. Jan. 28. The judgment of their Lordships was delivered by LORD THANKERTON. This appeal, by special leave, challenges

(1) [1914] 3 K. B. 387, 391.
(2) (1880) 5 App. Cas. 409, 415.
(3) [1928] A. C. 187.
(4) [1891] 1 Ch. 213.
(5) [1934] Can. S. C. R. 659.

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the constitutional validity of the Farmers' Creditors Arrangement Act, 1934, which was enacted by the Dominion Parliament as chapter 53 of the Statutes of Canada, 1934. The following question was referred to the Supreme Court of Canada by the Governor-General in Council on November 18, 1935, namely: "Is the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, ultra vires of the Parliament of Canada?"

Before the Supreme Court, the argument was presented by counsel on behalf of the Attorney-General for Canada and on behalf of the Attorneys-General for Ontario, Quebec, New Brunswick, British Columbia, Manitoba and Saskatchewan. On June 17, 1936, the judgment of the Supreme Court was delivered, and in the formal order the opinion of the Court is expressed as follows: "The Chief Justice, Mr. Justice Rinfret, Mr. Justice Crocket, Mr. Justice Davis and Mr. Justice Kerwin are of the opinion that the statute is intra vires; Mr. Justice Cannon is of the opinion that the statute, except s. 17, is ultra vires and that s. 17 is intra vires."

The Attorney-General for British Columbia now appeals against that judgment, and is supported by the respondent the Attorney-General for Ontario; the Attorney-General for Canada defends the judgment.

The appellant raises no question as to s. 17 of the Act, which relates to interest, and falls under head 19 of s. 91 of the British North America Act of 1867, but he maintains that the rest of the Act does not truly form legislation relating to "bankruptcy and insolvency," but is an invasion of the sphere of the Provincial Legislatures in relation to "property and civil rights in the Province" or "matters of a merely local or private nature in the Province," which is secured to them by heads 13 and 16 of s. 92 of the British North America Act.

The appellant submitted that the fundamental characteristic of legislation in relation to bankruptcy and insolvency is that it is conceived in the interests of the creditors as a class,

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and provides for distribution of the debtor's assets among them, and he maintained that the Act here in question is not only lacking in such a characteristic, but is inconsistent therewith, and he gave twelve reasons, which may be compendiously stated as follows: The Act is mainly designed to keep the debtor farmer on the land at the expense of his creditors; it deals with a stage prior to bankruptcy and insolvency, and is designed to prevent bankruptcy by means of a composition which is compulsory on creditors and defeats their interests; it deals with assets belonging to creditors for the benefit of the debtor; the references to bankruptcy are merely ancillary to the main design; and the Act has no general relation to bankruptcy and insolvency, as it refers to farmers only, and may refer to certain Provinces only.

The long title of the Act of 1934 is "An Act to facilitate compromises and arrangements between farmers and their creditors." The relevant sections of the Act of 1934, as amended by the Act of 1935, may now be referred to. The provisions and rules of the Bankruptcy Act are made applicable by sub-ss. 2 and 3 of s. 2 of the Act, which provide: "(2.) Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the *Bankruptcy Act*, and this Act shall be read and construed as one with the *Bankruptcy Act*, but shall have full force and effect notwithstanding anything contained in the *Bankruptcy Act*, and the provisions of the *Bankruptcy Act* and Bankruptcy Rules shall, except as in this Act otherwise provided, apply mutatis mutandis in the case of proceedings hereunder including meetings of creditors.

(3.) In any case where the affairs of a farmer have been arranged by a proposal approved by the Court or confirmed by the Board as hereinafter provided, Part I. of the *Bankruptcy Act* shall notwithstanding section seven thereof thereafter apply to such farmer but only failure on the part of such farmer to carry out any of the terms of the proposal shall be deemed to be an act of bankruptcy. Provided that such failure shall not be deemed an act of bankruptcy if, in the opinion of the Court, such act was due to causes beyond the control of such farmer."

The main provisions of the Act, on which the controversy turns, are contained in ss. 6 to 11, which relate to compositions, and s. 12, under which a Board of Review may be established; these sections provide as follows:—

"COMPOSITIONS.

6.—(1) A farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or scheme of arrangement either before or after an assignment has been made.

(2) Such proposal shall be filed with the Official Receiver who shall forthwith convene a meeting of the creditors and perform the duties and functions required by the *Bankruptcy Act* to be performed by a trustee in the case of a proposal for a composition, extension of time or scheme of arrangement.

7. A proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review as hereinafter provided.

8. Whenever a proposal relates to the rights of a secured creditor or of a person who has acquired movable or immovable property subject to a right of redemption, such creditor or person may value his security and shall be entitled to vote only in respect of the balance of his claim after deducting the amount of his valuation; provided, however, that no proposal shall be approved by the court which provides for the payment to such secured creditor or person on account of such security of any amount in excess of his valuation, or for granting to him any new security for an amount in excess of his valuation.

9. Subsections three and five of section sixteen of the *Bankruptcy Act* shall not apply in the case of a proposal for a

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composition, extension of time or scheme of arrangement made by any farmer.

10. Whenever a proposal has been approved by the court or whenever a proposal has been formulated and confirmed by the Board, as hereinafter provided, the court may order the farmer to execute any mortgage, conveyance or other instrument necessary to give effect to the proposal.

11.—(1) On the filing with the Official Receiver of a proposal, no creditor whether secured or unsecured, shall have any remedy against the property or person of the debtor, or shall commence or continue any proceedings under the *Bankruptcy Act*, or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, or the realization of any security unless with leave of the court and on such terms as the court may impose: Provided, however, that the stay of proceedings herein provided shall not be effective for more than ninety days from the date of filing of the proposal with the Official Receiver, unless the court makes one or more orders extending the time for the purpose of any proceedings in connection with the proposal. [1935, Ch. 20, s. 3, Am.]

(2) On a proposal being filed the property of the debtor shall be deemed to be under the authority of the court pending the final disposition of any proceedings in connection with the proposal and the court may make such order as it deems necessary for the preservation of such property.

Provincial Boards of Review.

12.—(1) The Governor in Council may, whenever he considers it expedient, establish in any province a Board of Review which shall exercise in such province the jurisdiction hereinafter provided.

(2) A Board shall consist of a Chief Commissioner and two Commissioners who shall be appointed by the Governor in Council and shall hold office during pleasure and shall receive such remuneration as the Governor in Council may provide.

(3) The Chief Commissioner shall be a judge of the court of the province invested with original or appellate jurisdiction

in bankruptcy by the *Bankruptcy Act*, and one Commissioner shall be appointed as a representative of creditors and one Commissioner shall be appointed as a representative of debtors. In the event of any Commissioner other than the Chief Commissioner being unable to hear and deal with any case for any reason considered sufficient by the remaining Commissioners, then the remaining Commissioners shall name an ad hoc Commissioner to hear and deal with such case with all the powers of the Commissioner whose place he takes. In the event of the Chief Commissioner being unable to hear and deal with any case on the request of the other Commissioners the Minister shall name an ad hoc Chief Commissioner with all the powers of the Chief Commissioner. [1935, Ch. 20, s. 4, Am.]

(4) In any case where the Official Receiver reports that a farmer has made a proposal but that no proposal has been approved by the creditors, the Board shall, on the written request of a creditor or of the debtor, endeavour to formulate an acceptable proposal to be submitted to the creditors and the debtor, and the Board shall consider representations on the part of those interested.

(5) If any such proposal formulated by the Board is approved by the creditors and the debtor, it shall be filed in the court and shall be binding on the debtor and all the creditors.

(6) If the creditors or the debtor decline to approve the proposal so formulated, the Board may nevertheless confirm such proposal, either as formulated or as amended by the Board, in which case it shall be filed in the Court and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by the creditors and approved by the Court. [1935, Ch. 20, s. 5, Am.]

(7) Every request to formulate a proposal shall be dealt with by the full Board, but a determination of the majority shall be deemed to be the determination of the Board: Provided that the Board may direct any one or more of its members on its behalf to inspect and investigate any or all circumstances of any request for review and report to the Board. [1935, Ch. 20, s. 6, Am.]

(8.) The Board shall base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm.

(9.) The Board may decline to formulate a proposal in any case where it does not consider that it can do so in fairness and justice to the debtor or the creditors.

(10.) For the purposes of the performance of its duties and functions hereunder a Board shall have the powers of a Commissioner appointed under the *Inquiries Act*.

(11.) Notwithstanding anything contained in the *Bankruptcy Act*, an insolvent debtor resident in the Province of Quebec, engaged solely in farming or the tilling of the soil, whose liabilities to creditors provable as debts under the *Bankruptcy Act* exceed five hundred dollars, may make an assignment for the general benefit of his creditors in any case where the Board declines to formulate a proposal and certifies that in its opinion the debtors' affairs can best be administered under the *Bankruptcy Act*. [1935, Ch. 20, s. 7, Am.]"

In a general sense, insolvency means inability to meet one's debts or obligations ; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors ; the law also generally allows the debtor to apply for the same administration. The justification for such proceeding by a creditor generally consists in an act of bankruptcy by the debtor, the conditions of which are defined and prescribed by the statute law. In a normal community it is certain that these conditions will require revision from time to time by the Legislature ; as also the classes in the community to which the bankruptcy laws are to apply may require reconsideration from time to time. Their Lordships are unable to hold that the statutory conditions of insolvency which enabled a creditor or the debtor to invoke the aid of the bankruptcy laws, or the classes to which these laws applied, were intended to be stereotyped under head 21 of s. 91 of the British North

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America Act so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regards these matters.

Further, it cannot be maintained that legislative provision as to compositions, by which bankruptcy is avoided, but which assumes insolvency, is not properly within the sphere of bankruptcy legislation. (*In re Companies' Creditors Arrangement Act.* (1))

It will be seen from the sections above quoted that the Act here in question relates only to a farmer who is unable to meet his liabilities as they become due, and enables him to make a proposal for a composition, extension of time or scheme of arrangement either before or after an assignment has been made, for which a precedent existed in the Canadian Bankruptcy Act of 1919. As defined in s. 2, an assignment means an assignment made under the Bankruptcy Act by a farmer. If the creditors fail to approve of the farmer's proposal, the Board of Review, on the written request of a creditor or the debtor, is to endeavour to formulate "an acceptable proposal" for submission to the creditors and the debtor; if the creditors or the debtor decline to approve the Board's proposal, the Board may nevertheless confirm their proposal, and it is to bind the creditors and the debtor.

Subject to the contention by the appellant, now to be dealt with, their Lordships are of opinion that these provisions fall within head 21 of s. 91 of the British North America Act.

The appellant maintains that the real object of these provisions is to keep the farmers on the land for the benefit of agricultural production, and that this object is to be attained by the operations of the Board of Review, who have power to sacrifice the interests of the creditors for the benefit of the debtor farmer; he further maintains that under s. 7 the secured creditor may be deprived of that which is his property. To deal first with the last contention, their Lordships are clearly of opinion that s. 7 does not enable any creditor to be deprived of his security, but does enable the proposal for composition to provide for the reduction of the debt itself, or an extension of time for its payment, which is a familiar feature of compositions.

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(1) [1934] Can. S. C. R. 659.

The appellant laid stress on the provisions of sub-s. 8 of s. 12, but that does not appear to their Lordships to be an illegitimate or unusual element to be taken into account in the consideration of composition schemes, and, indeed, the retention of the business under the management of the debtor may well be a consideration in the interests of the creditors as well as of the debtor. Its fair application appears to be well secured by the provisions of sub-ss. 3, 4 and 9. A judicial Chief Commissioner is provided for under sub-s. 3; under sub-s. 4 the Board's proposal is to be designed as an acceptable one to both parties, and this element is emphasized by sub-s. 9. Their Lordships are unable to accept the contention that the Act is not genuine legislation relating to bankruptcy and insolvency.

Accordingly, the appeal fails, and their Lordships will humbly advise His Majesty that the appeal should be dismissed, without costs, and that the opinion of the majority of the Supreme Court should be affirmed.

Solicitors for the Attorney-General for British Columbia: *Gard, Lyell & Co.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Attorney-General for Ontario: *Blake & Redden.*

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Jan. 28.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR ONTARIO APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . RESPONDENTS.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Dominion Statute—Constitutional validity—Suppression of detrimental trade practices—National trade mark—Civil right of novel character—Valid legislation—British North America Act, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91 (2); *s.* 92 (14)—*Dominion Trade and Industry Commission Act,* 1935, *St. Can.* (25 *&* 26 *Geo.* 5, *c.* 59), *s.* 2 (*h*); *s.* 15, *sub-s.* 2, *to s.* 26.

Sect. 15, sub-s. 2; ss. 16, 17, and 23 to 26 inclusive, of the Dominion Trade and Industry Commission Act, 1935, of the Parliament of Canada, which was passed for the purpose of giving effect to certain recommendations contained in the Report of the Royal Commission on Price Spreads, were intra vires of the Dominion Parliament. Sects. 20, 21 and 22 of the Act, so far as they were applicable to such of the enactments, or to offences created by such of the enactments enumerated in s. 2 (*h*) of the Act as might be intra vires were not ultra vires.

Sect. 18 of the Act, which provided that the words "Canada Standard" or the initials "C.S." should be a national trade mark, vested in His Majesty in right of the Dominion, and that the application of that national trade mark to any commodity warranted it to conform to the relevant Dominion commodity standard, and s. 19, by which any producer or manufacturer or merchant was given permission to apply the national trade mark to any commodity provided it conformed to the appropriate statutory specification, were intra vires of the Dominion Parliament under head 2 of s. 91 of the British North America Act, 1867, "the regulation of trade and commerce." The substance of that legislation was to define a national mark, and to give the exclusive use of it to the Dominion so as to provide a logical basis for a system of statutory licences to producers, manufacturers and merchants. The method adopted in s. 18 was to create a civil right of a novel character, but there seemed to be no reason why the legislative competence of the Dominion Parliament should not extend to the creation of juristic rights in novel fields if they could be brought fairly within the classes of subjects confided to Parliament by the constitution.

Judgment of the Supreme Court of Canada [1936] Can. S. C. R. 379 varied.

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT M.R., and SIR SIDNEY ROWLATT.

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APPEAL (No. 105 of 1936) and cross-appeal, by special leave, from a judgment of the Supreme Court of Canada (June 17, 1936) answering the following question referred to the Court by Order of the Governor-General in Council, dated November 5, 1935: "Is the Dominion Trade and Industry Commission Act, 1935, or any of the provisions thereof and in what particular or particulars or to what extent, ultra vires of the Parliament of Canada?" The effect of the relevant sections of the Act, which was passed for the purpose of giving effect to certain recommendations contained in the Report of the Royal Commission on Price Spreads, which had found that there were prevalent throughout Canada trade practices which were deemed to be detrimental to the interest of the public and which should be suppressed, was as follows:—

"Sect. 2. In this Act, unless the context otherwise requires: (*h*) 'Laws prohibiting unfair trade practices' means the provisions of the Agricultural Pests Control Act, The Canada Grain Act, the Combines Investigation Act, the Dairy Industry Act, the Electrical Units Act, The Electricity Inspection Act, 1928, the Feeding Stuffs Act, the Fertilizer Act, the Fish Inspection Act, the Food and Drugs Act, The Fruit, Vegetables and Honey Act, the Gas Inspection Act, the Inspection and Sale Act, the Live Stock and Live Stock Products Act, The Maple Sugar Industry Act, 1930, the Meat and Canned Foods Act, The Natural Products Marketing Act, 1934, The Patent Act, 1935, the Petroleum and Naphtha Inspection Act, The Precious Metals Marketing Act, 1928, the Proprietary or Patent Medicine Act, the Seeds Act, the Trade Mark and Design Act, The Unfair Competition Act, 1932, the Water Meters Inspection Act, the Weights and Measures Act, and of sections 404, 405, 406, 415A and 486 to 504, inclusive, of the Criminal Code, and of this Act and regulations under the said Acts, which provisions prohibit acts or omissions connected with industry as being fraudulent, misrepresentative or otherwise unfair or detrimental to the public interest;"

Sect. 3 establishes a Dominion Trade and Industry Commission of three persons.

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Sect. 13 charges the Commission with the administration of the Combines Investigation Act (the constitutional validity of which had been unsuccessfully challenged in *The Proprietary Articles Trade Association* v. *Attorney-General for Canada.* (1))

Sect. 14 empowers the Commission, after investigation, to recommend to the Governor-in-Council for approval agreements between persons in a specific industry, in which there is wasteful or demoralising competition, for controlling and regulating prices. The interests of trade and the public are protected. The Commission is bound to require persons engaged in the industry to furnish full information relating to operations within the industry under the agreements, and may recommend that approval of an agreement be withdrawn. The parties to an approved agreement are protected from prosecution without the consent of the Commission.

Sect. 15 charges the Commission with responsibility for recommending prosecutions for offences relating to commodity standards, and authorizes the Attorney-General for Canada to require the Director of Public Prosecutions (an official appointed under ss. 21 and 22 of the Act) to institute proceedings for the punishment of any such offence. The section also authorizes the Commission to study, investigate, report and advise on questions relating to commodity standards, grading and the protection of consumers, and to report on the desirability of establishing commodity standards and grades for any commodity.

Sects. 16 and 17 require the National Research Council, at the Commission's request, to aid the Commission in specified ways.

Sect. 18 makes "Canada Standard" or "C.S." a national trade mark, vested in His Majesty in right of the Dominion, the application of which to any commodity warrants it to conform to the relevant Dominion commodity standard.

Sect. 19 authorizes any producer, manufacturer, dealer or merchant to apply the trade mark to any commodity in accordance with regulations made by the Commission, provided that the commodity conforms to the relevant standard and that (subject to a dispensing power in the Commission in respect

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(1) [1931] A. C. 310.

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of specific commodities) any grade designation established by Dominion legislation for such commodity is conspicuously applied in accordance with the Commission's regulations.

Sect. 20 requires the Commission to receive and investigate complaints of unfair trade practices, with power before or after an investigation to recommend prosecution. The Attorney-General for Canada, if he concurs, may send the recommendation to the Director of Public Prosecutions or to the Attorney-General for the Province in which the offence is alleged to have been committed.

Sects. 21 and 22 provide for the appointment of a Director of Public Prosecutions to prosecute at the instance of the Attorney-General for Canada in important or difficult cases of unfair trade practices prohibited by law, to advise or assist provincial Attorneys-General in connection with the prosecution for such practices, and to assist the Commission in investigating allegations or complaints of such practices, committed or contemplated.

Sect. 23 empowers the Commission to invite persons engaged in any industry to a conference on practices in the industry to determine what practices are unfair and undesirable, and to make public the general opinion of the conference, or the opinion of the Commission, on any trade practice considered unfair or undesirable.

Sect. 24 empowers the Commission to co-operate with any board of trade or chamber of commerce in any commercial arbitration conducted by or under the authority of such board or chamber.

Sect. 25 obliges the Commission, when required by the Governor-in-Council, to study, investigate, report and advise on questions relating to the general trend of social or economic conditions or to any social or economic problem of Canada; and to co-operate with the Economic Council in any economic investigation.

Sect. 26 applies the Inquiries Act, the Combines Investigation Act and the Tariff Act to inquiries and investigations under the Act, and gives the Commission the powers of a commission under the Inquiries Act.

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The Supreme Court of Canada (Duff C.J., Rinfret, Cannon, Crocket, Davis and Kerwin JJ.), whose answer was expressed to be directed only to those sections of the Act upon which they had had the benefit of argument, held that ss. 14, 18 and 19 were ultra vires; that ss. 16 and 17 were not ultra vires; and that ss. 20, 21 and 22 so far as they were applicable to such of the enactments, or to offences created by such of the enactments enumerated in s. 2 (*h*) as might be intra vires were not ultra vires. The judgment of the Supreme Court is reported at [1936] Can. S. C. R. 379.

The Dominion cross-appealed in respect of ss. 18 and 19, but there was no appeal or cross-appeal against the finding that s. 14 was ultra vires.

1936. Nov. 12, 13. *A. W. Roebuck K.C.*, A.-G. for Ontario, and *I. A. Humphries K.C.* for the Attorney-General for Ontario. Sect. 20, dealing with " Unfair Trade Practices," is appealed against by Ontario. The first part of the section was upheld so far as s. 2 (*h*) is intra vires. There is no definition of unfair trade practices; they are not confined to what is criminal. There is a distinction between a Parliamentary Committee investigating conditions within the Dominion for the purposes of supplying Parliament with information and the appointing of a Commission for the purpose of interfering with civil rights in the Province. The Commission's right to investigate is, however, conceded, because the decision in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1) is conclusive. This Act provides for an inquiry into civil rights, as opposed to the Combines Investigation Act, R. S. C., 1927, c. 26: the *Proprietary Articles Trade Association* case. (1) The only ground of objection is that it permits an investigation into these practices which are property and civil rights in the Province. The last sentence of s. 20 goes with the next argument on ss. 21 and 22. The real objection is in respect of s. 22 (*a*): that sub-section is an invasion of the provisions of s. 92, head 15, of the British North America Act, 1867, which reserves to the Province the administration of

(1) [1931] A. C. 310.

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justice. In this legislation there is a constant stepping forward, an encroachment which alarms the Provincial authorities. Sect. 23, " Fair Trade Conferences," is opposed. It is submitted that that involves the review of agreements, a criticism of contracts, and a criticism and determination as to the desirability and fairness of a great many trade practices which are thought by some to be undesirable. *Citizens Insurance Company of Canada* v. *Parsons* (1) puts the review of agreements and contracts in the hands of the Provinces with a view to controlling industry. Looked at from the standpoint of an inquiry into the persons engaged in industry the enquiry in this Act invades their civil rights: looked at from the standpoint of the general public, it deals with matters purely local within the Province. Further, s. 23 is simply a permissive one in that the Commission may invite representative persons engaged in industry to a conference to consider commercial practices that prevail in any such industry, and determine what practices are unfair or undesirable in the interest of the industry, and of any person engaged in such industry, and of the general public. This again gives to a Dominion appointed Commission power, when such a Conference is held, to determine what practices are unfair or undesirable. This is not " regulation of trade and commerce " under s. 91 (2) of the British North American Act. It is dealing with property and civil rights within the Province, and on a review of agreements, contracts, practices, etc., of any one engaged in a particular industry, to say what is unfair. In so far, therefore, such section is ultra vires of the power of Parliament.

Sect. 25 sets up a Commission to inquire into the social and economic conditions in the Provinces: contracts and agreements might come under that: *Parsons'* case (1); and prices and commodities: the *Proprietary Articles Trade Association* case (2); and wages, hours and conditions of labour: *In re Legislative Jurisdiction over Hours of Labour* (3)—it was held in that case that the control of hours of labour of working people was within the domain of the

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(1) (1881) 7 App. Cas. 96.
(2) [1931] A. C. 310.
(3) [1925] Can. S. C. R. 505.

Province. As to s. 26, if the words had been "to study and advise" there would have been no objection, but the Commission is to investigate, and that is wide enough to include investigation into property and civil rights. There is no objection to a Parliamentary Committee, but to have a standing Board for the purpose of reviewing contracts in the Province is undesirable. Sect. 27 gives a plain express right to regulate or to interfere in the regulation of prices, production and agreements. Sects. 20, 23, 25, 26 and 27 of the Act are ultra vires.

J. B. McNair K.C., A.-G. for New Brunswick, and *Frank Gahan* for the Attorney-General for New Brunswick. Complaint is now made by New Brunswick of s. 15; s. 17, sub-s. 3; and ss. 20, 21, 22, 23 and 27. On the question of inquiries and the right to inquire, it is submitted that a power to investigate, whether it gives a permissive power to investigate or compels the body set up to investigate, is only a matter on which the Dominion can pass an Act if it is in relation to matters in respect of which the Dominion can pass legislation. The exclusive power to investigate any matters which can only be dealt with by the Legislatures of the Provinces, in so far as investigation depends upon the authority of an Act of Parliament, is within the exclusive sphere of the Provincial Legislature and not within the Dominion sphere: *In re The Board of Commerce Act*, 1919, *and The Combines and Fair Prices Act*, 1919 (1); *Lymburn* v. *Mayland*. (2) Sect. 15, along with ss. 21 and 22, is impeached as being an interference with the administration of justice. If it is intended to invade the duties of the Provincial Attorneys-General under s. 92 of the British North America Act, or to consider whether he is properly performing those duties, the legislation is objectionable. The only point on s. 17, sub-s. 3, is that it appears to deal with a question of civil rights in the Province. The objection to s. 20 is that there appears to be nothing in the Act which relates these powers, and certainly nothing which restricts these powers, to matters which are within Dominion competence. With regard to s. 22 (*a*), that it shall be the duty of the Director of Public Prosecutions under the superintendence of the

(1) [1922] 1 A. C. 191, 199. (2) [1932] A. C. 318, 325.

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Minister of Justice to institute criminal proceedings, the objection there depends on whether "the refusal or failure of any other person" includes the Provincial Attorney-General. The objection is on the ground that the sub-section seems to set the Director of Public Prosecutions as an official to decide whether or not the Provincial Attorney-General is properly carrying out his duties, and that it creates a state of conflict which could not have been the intention of the British North America Act. Sect. 23, which deals with "Fair Trade Conferences," enables the Commission under Dominion legislation to consider civil rights and matters merely local without any relation to the question whether they come within any head of Dominion jurisdiction, and the section is an encroachment on Provincial jurisdiction. Sects. 24, 25 and 26, in so far as they provide for investigation by the Commission, are subsidiary sections which should fall within the sections held to be invalid, and they are independently open to objection as purporting to give the Commission such wide powers of investigation as to interfere seriously with the property and civil rights of persons and corporations in the Provinces.

R. S. Robertson K.C., *L. S. St. Laurent K.C.*, *C. P. Plaxton K.C.*, *Peter Wright* and *R. St. Laurent*, for the Attorney-General for Canada. Sect. 15—Commodity Standards—the first portion, and ss. 21 and 22 (*a*) are justified, among other reasons, by the language in the *Proprietary Articles Trade Association* case. (1) All that flows from the proper construction of the first part of s. 15 and from s. 22 (*a*) is that proper action should be taken to institute the proceedings in the manner in which it is proper that proceedings may be instituted, and even if the language may be susceptible of a construction which would take it beyond that, in dealing with like language in other cases this Board has laid down the rule that the construction under which it may be competent is the one which would be adopted: *Attorney-General for Ontario* v. *Reciprocal Insurers*. (2) It does not mean forcing upon the Attorney-General for the Province any advice he may be reluctant to accept. As to s. 17, sub-s. 3, it is certainly within

(1) [1931] A. C. 310.

(2) [1924] A. C. 328, 344.

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the province of the Dominion Parliament to prescribe the duties of the officers of the public service of Canada: *O'Connor* v. *Waldron* (1); *Attorney-General for Ontario* v. *Attorney-General for Canada.* (2) Sect. 22 (*c*) would be merely ancillary to s. 20. With regard to "Fair Trade Conferences" in s. 23, the conferences are merely conferences, no one can be compelled to attend, no one can be compelled to give evidence or produce documents. This is enabling legislation permitting the Commission to do this. Nobody objects to s. 24. As to s. 25—"Economic investigation"—the power to investigate is a proper and necessary power. It is conceivable that persons entrusted with that power might attempt to exercise it beyond what would be a proper exercise of it, and in two Canadian cases where attempts were made to obtain injunctions to prevent such investigations the Court said that they would not presume that the Commission would go beyond its powers, and that if it did attempt to do so it could be restrained at that time. [In contrasting the Australian and the Canadian constitutions reference was made to *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.* (3)] The onus is upon anyone challenging the validity of this legislation to show that it is an encroachment on the Provincial legislative powers. The holding of s. 25 intra vires does not imply that there might not be tasks set to the Commission which would be outside the scope of the section. There is undoubtedly a field within which this section could operate, and it is fair to assume that the Governor-General in Council would not attempt to authorize investigations outside the field of knowledge that is pertinent to the Government of Canada in the proper discharge of its duties. Sect. 26 is the enabling section: it is contended that the Commission, when properly authorized under the Act to conduct an investigation, shall have the power provided by s. 26 to make that investigation effective.

Sects. 18 and 19, which are the objects of the cross-appeal, provide for a Canada Standard and make it an offence to use

(1) [1935] A. C. 76.

(2) [1912] A. C. 571, 588–9.

(3) [1914] A. C. 237, 252.

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that standard otherwise than as provided in the sections. Those sections are enactments in relation to the regulation of trade and commerce. They relate also to the protection of industrial property as defined in the International Convention in that behalf signed at The Hague on November 1, 1925 (Canadian ratification deposited May 1, 1928). The sections also relate to the criminal law; and at the time of confederation the regulation and protection of trade marks was dealt with in statutes relating to the criminal law. Further, ss. 18 and 19 relate to a matter of international, as well as national, concern and are, therefore, enactments in relation to the peace, order and good government of Canada within the scope of the residuary power of the Parliament of Canada. The subject-matter of ss. 18 and 19 transcends Provincial legislative authority. [Reference was made to the *Proprietary Articles Trade Association* case (1); the *Board of Commerce Act* case (2); and *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction.* (3)] The Produce Marketing Act of British Columbia was held to be invalid Provincial legislation as dealing with a matter of trade and commerce which was of more than Provincial concern. There must be cases which would require both Federal and Provincial action in order to be dealt with completely. Sects. 18 and 19 declare what the Canada Standard is intended to represent, and penalise whosoever offers a commodity so marked if it is fraudulently marked: all that could have been done in a prohibitive form by proper sections in the Criminal Code. If Parliament decides that a harmful practice should be suppressed in the public interest, it is proper criminal law. This is something which is really outside any of the heads of s. 92 of the British North America Act. Quebec could set up a Quebec standard for intra-State trade: this in no way restricts the rights of the Provinces. There is no invasion of any exclusive field of Provincial jurisdiction.

Roebuck K.C. replied. The combined effect of the judgment in *Attorney-General for the Commonwealth of Australia*

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(1) [1931] A. C. 310.

(2) [1922] 1 A. C. 191, 198.

(3) [1931] Can. S. C. R. 357, 364.

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v. *Colonial Sugar Refining Co.* (1) is that an Act of a general character permitting the Commission to ask all sorts of questions, some of which might be inside and some outside of the constitutional rights of the Australian Commonwealth, was ultra vires of the Commonwealth. That is almost on all fours with the present legislation—an Act permitting an investigation into social and economic conditions which may or may not be within Dominion jurisdiction, and which, on the other hand, may or may not be within Provincial jurisdiction, is ultra vires of the Dominion Legislature. With regard to the cross-appeal, the legislation appears to be harmless and in the public interest.

Gahan, in reply, and dealing with the cross-appeal: The position of the Attorney-General for New Brunswick is not directed so much to the particular effect of these two sections, 18 and 19, as to the ground on which the Dominion seeks to justify them.

[Reference was also made to *Citizens Insurance Company of Canada* v. *Parsons* (2); *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (3); *John Deere Plow Co.* v. *Wharton* (4); *In re The Board of Commerce Act*, 1919, *and The Combines and Fair Prices Act*, 1919 (5); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (6); and *Proprietary Articles Trade Association* v. *Attorney-General for Canada.* (7)]

1937. Jan. 28. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal and cross-appeal from a judgment of the Supreme Court on a reference by the Governor-General in Council, dated November 5, 1935, asking whether The Dominion Trade and Industry Commission Act was ultra vires of the Parliament of Canada. The unanimous answer of the Supreme Court, which was expressed to be directed only to those sections of the Act upon which they had the benefit of argument, was that ss. 14, 18, and 19 were ultra vires, that ss. 16 and 17 were not ultra vires: and that ss. 20, 21 and 22 so far as they were applicable to such of the enactments, or to offences created by such of the enactments, enumerated in s. 2 (*h*) as might be intra vires were not ultra vires. The Board were invited in argument to deal with ss. 23-26 inclusive, which are not referred to in the judgment of the Supreme Court, presumably because no argument upon them was addressed to the Court. Except on one point—namely, as to the validity of ss. 18 and 19, their Lordships agree with the judgment of the Supreme Court and the reasons given by the Chief Justice, with which the other learned judges concurred. Sect. 15, sub-s. 2; ss. 16, 17 and 20 appear to be legitimate provisions for ascertaining whether criminal acts have been committed. Sect. 22 (*a*) was said to take out of the control of the Law Officers of the Province the conduct of the criminal proceedings referred to in the section. If so, it was said to encroach upon s. 92 (14): the Administration of Justice in the Province. A similar objection was made to the latter part of s. 20. The answer in respect of both sections is that the contention is based upon a construction of the section which the words do not bear. Nothing in the section gives either the Attorney-General for Canada, or the Director of Public Prosecutions any authority other than to commence proceedings in accordance with the law of the Province, and thereafter to give such assistance to the authorities of the Province as is within the existing rights of persons in such case, and as may be acceptable to the authorities. Sects. 23 to 26 appear to define the power of the Commission, and to give them no rights of interfering with rights or property in the Province, except possibly powers under s. 26 which are of like validity with the powers given by the valid Dominion Acts there referred to.

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(1) [1914] A. C. 237, 257.
(2) 7 App. Cas. 96, 111.
(3) [1896] A. C. 348, 362.
(4) [1915] A. C. 330, 340.
(5) [1922] 1 A. C. 191, 198, 201.
(6) [1924] A. C. 222.
(7) [1931] A. C. 310, 326.

The only remaining question is as to the validity of ss. 18 and 19, which is the subject-matter of the cross-appeal, and in this matter only their Lordships find themselves in disagreement with the judgment of the Supreme Court. Sect. 18, sub-s. 1, provides that "the words 'Canada

Standard' or the initials 'C.S.' shall be a national trade-mark and the exclusive property in and the right to the use of such trade-mark is thereby declared to be vested in His Majesty in the right of the Dominion. . . . ." By sub-s. 2 such national trade mark as applied to any commodity pursuant to the provisions of that Act or any other Act of the Parliament of Canada is to constitute a representation that such commodity conforms to the requirements of a specification of a commodity standard established under the provisions of any Dominion Act. By s. 19, sub-s. 1, any producer, or manufacturer or merchant is given permission to apply the national trade mark to any commodity provided it conforms to the appropriate statutory specification, and by sub-s. 2 it is made an offence to apply the mark to any commodity in violation of the prescribed conditions.

There exists in Canada a well established code relating to trade marks created by Dominion statutes, to be found now in the Trade Marks and Designs Act, R. S. C., 1927, c. 201, amended by S. C., 1928, c. 10. It gives to the proprietor of a registered trade mark the exclusive right to use the trade mark to designate articles manufactured or sold by him. It creates, therefore, a form of property in each Province and the rights that flow therefrom. No one has challenged the competence of the Dominion to pass such legislation. If challenged one obvious source of authority would appear to be the class of subjects enumerated in s. 91 (2), the Regulation of trade and commerce, referred to by the Chief Justice. There could hardly be a more appropriate form of the exercise of this power than the creation and regulation of a uniform law of trade marks. But if the Dominion has power to create trade mark rights for individual traders, it is difficult to see why the power should not extend to that which is now a usual feature of national and international commerce—a national mark. It is perfectly true, as is said by the Chief Justice, that the method adopted in s. 18 is to create a civil right of a novel character. Ordinarily, a trade mark gives rights only when used in connection with goods manufactured or sold by the person who has the right to use the mark. A trade

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mark "in gross" would be an anomaly. And it obviously is not contemplated that the Crown should have any proprietary interest in the goods to which the mark vested in the Crown is to be applied. But there seems no reason why the legislative competence of the Dominion Parliament should not extend to the creation of juristic rights in novel fields. if they can be brought fairly within the classes of subjects confided to Parliament by the constitution. The substance of the legislation in question is to define a national mark, to give the exclusive use of it to the Dominion so as to provide a logical basis for a system of statutory licences to producers, manufacturers and merchants. To vest the "exclusive property" in the mark in His Majesty is probably no more than to vest "the use of" the mark in His Majesty. It may afford a useful civil protection for the mark when it is violated in Canada by persons who have not violated the somewhat restricted prohibition of the penal sub-section (which only applies to persons who "apply" the mark to commodities), or violated abroad, where the penal provisions of the law of Canada could not be applied at all. It may be noticed that s. 53 of the Trade Marks and Designs Act, R. S. C., 1927, c. 201, appears to afford protection in Canada to trade marks owned by foreign associations though held by them "in gross." For the reasons above given the legislation appears to their Lordships to be within the competence of the Dominion Parliament. No appeal was directed to the Board as to the answer to s. 14. Their Lordships therefore will humbly advise His Majesty that the appeal be dismissed and the cross-appeal be allowed, and that the answers be varied as to ss. 18 and 19 by stating that the sections are not ultra vires, and by adding that as to ss. 23 to 26 inclusive these sections are not ultra vires.

Solicitors for the Attorney-General for Ontario and for the Attorney-General for New Brunswick: *Blake & Redden.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

[HOUSE OF LORDS.]

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TOWNLEY MILL COMPANY (1919), LIMITED . . . . . . APPELLANTS;

AND

THE ASSESSMENT COMMITTEE FOR THE ASSESSMENT AREA OF OLDHAM . . . . . . RESPONDENTS.

Rating—Industrial hereditament—Unoccupied spinning mill—Process machinery—User of mill as warehouse—No beneficial occupation—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 24, *sub-s.* 1, *and Third Schedule.*

Sect. 24, sub-s. 1, of the Rating and Valuation Act, 1925, relating to the making and revision of valuation lists under Part II. of the Act, which applied to the hereditament in question in this appeal, provides as follows:—

" (*a*) All such plant and machinery in or on the hereditament as belongs to any of the classes specified in the Third Schedule to this Act shall be deemed to be part of the hereditament:

(*b*) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament."

The Third Schedule to the Act specifies the " Classes of Machinery and Plant to be deemed to be part of the Hereditament," that is to say:—

" 1. Machinery and plant (together with the shafting, pipes, cables, wires, and other appliances and structures accessory thereto) which is used or intended to be used, mainly or exclusively in connection with any of the following purposes, that is to say:—

(*a*) the generation, storage, primary transformation or main transmission of power in or on the hereditament; or

(*b*) the heating, cooling, ventilating, lighting, draining, or supplying of water to the land or buildings of which the hereditament consists, or the protecting of the hereditament from fire: Provided . . . .

2. Lifts and elevators mainly or usually used for passengers.

3. Railway and tramway lines and tracks.

4. Such part of any plant or combination of plant and machinery, including gas holders, blast furnaces, coke ovens, tar distilling plant, cupolas, water towers with tanks, as is, or is in the nature of, a building or structure."

A company, which owned and occupied a cotton spinning mill, stopped working; they sold the stores and let the basement,

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* *Present:* LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, and LORD MAUGHAM.

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and left the remainder of the structure and its contents in charge of a caretaker with a view to selling or letting them if occasion occurred. At the material time there remained in the mill machinery and plant of the classes mentioned in s. 24, sub-s. 1 (*a*) (which for convenience was described as " motive machinery and plant "). There were also certain fixed machines and loose chattels falling within s. 24, sub-s. 1 (*b*) (called for convenience " process machinery and plant ") :—

Held, that the Company were not rateable as the occupiers of premises used as a warehouse for the process machinery, on the grounds (1.) that by s. 24, sub-s. 1 (*b*), no account is to be taken of the value of such plant or machinery ; (2.) that the Act applies to hereditaments whether in active operation or out of work.

Whether *Staley* v. *Castleton* (1864) 5 B. & S. 505, and *Harter* v. *Salford* (1865) 6 B. & S. 591, apply to fixed machinery, *quaere*.

Whether the practice of treating the owner of an empty house as not rateable is an exception to the general law of rating, *quaere*.

Borwick v. *Southwark Corporation* [1909] 1 K. B. 78 questioned.

APPEAL from an order of the Court of Appeal (1) relating to the rateability of a mill in which the Townley Mill Co. (1919), Ld., formerly carried on the business of cotton spinners.

The building was erected in 1884 by the Townley Mill Co., Ld., and motive plant, blowing room machinery, cards, slubbers, intermediate frames, rovers, mules and other necessary machinery were made for the mill and installed therein by that Company.

In 1905 the same Company extended the building and provided and installed similar machinery in the extension. Both the original building and the extension were specially designed to contain and support plant and machinery of the kind and description mentioned above.

Much of the plant and machinery installed in 1884 and 1905 still remained on the premises on April 1, 1933, but from time to time machines had been substituted in the place of others which had become worn out or otherwise unsuitable for further use.

In 1919 the Townley Mill Co. (1919), Ld., hereinafter called the Company, was incorporated to acquire the mill, and it worked the mill until May, 1931, when it stopped production. In September, 1931, the Company closed the mill. In April, 1932, it let the basement and thereafter was ready to sell or

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let the remainder. In August, 1932, the Company sold the mill stores. In October, 1932, it stripped the rovings. In February, 1933, it ceased to occupy the offices as its registered office. On April 1, 1933, the only person engaged on the premises was the engineer who was employed at the rate of *2l.* 12*s.* 6*d.* a week instead of 6*l.* as theretofore. After April 1, 1933, it was the duty of the engineer to maintain steam in one boiler in winter and summer if he thought it necessary for the preservation of the building and its contents, but heat was not otherwise maintained in the mill. He had also to look after the machinery and, so far as was necessary for that purpose, occasionally to turn the shafting by barring the engine and the machinery by hand. The whole of the plant and machinery was maintained in position.

On April 1, 1933, this plant and machinery consisted of :—

Class I. Machinery and plant within s. 24, sub-s. 1 (*a*), of the Rating and Valuation Act, 1925, which enacts as follows :—

> " For the purpose of the making or revision of valuation lists under this Part of this Act, the following provisions shall have effect with respect to the valuation of any hereditament other than a hereditament the value of which is ascertained by reference to the accounts, receipts or profits of the undertaking carried on therein :—
>
> (*a*) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in the Third Schedule to this Act shall be deemed to be a part of the hereditament."

The Third Schedule to the Act is headed " Classes of Machinery and Plant to be deemed to be Part of the Hereditament." It specifies the following :—

> " 1. Machinery and plant (together with the shafting, pipes, cables, wires, and other appliances and structures accessory thereto) which is used or intended to be used, mainly or exclusively in connection with any of the following purposes, that is to say ;—
>
> (*a*) the generation, storage, primary transformation or main transmission of power in or on the hereditament ; or

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(*b*) the heating, cooling, ventilating, lighting, draining or supplying of water to the land or buildings of which the hereditament consists or the protecting of the hereditament from fire:

Provided that, in the case of machinery or plant which is in or on the hereditament for the purpose of manufacturing operations or trade process, the fact that it is used in connection with those operations or processes for the purpose of heating, cooling, ventilating, lighting, supplying water, or protecting from fire shall not cause it to be treated as falling within the classes of machinery or plant specified in this Schedule.

2. Lifts and elevators mainly or usually used for passengers.

3. Railway and tramway lines and tracks.

4. Such part of any plant or any combination of plant and machinery, including gas holders, blast furnaces, coke ovens, tar distilling plant, cupolas, water towers with tanks, as is, or is in the nature of, a building or structure."

Machinery of this class is hereinafter referred to as motive machinery.

Class II. consists of machinery and plant within s. 24, sub-s. 1 (*b*), to the Rating and Valuation Act, 1925, which provides that "subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament." This class includes (A) fixed machinery; (B) loose accessories used in the various machines; (C) loose accessories to machinery and plant in Class I. and Class II. (A) necessary for working the plant and machinery.

The articles in Class II. (B) and Class II. (C) were part of and went with the plant and machinery in Class I. and Class II. (A). Otherwise they were not in issue.

Machinery of this class is hereinafter referred to as process machinery.

Class III. consisted of loose chattels which were not in issue.

In pursuance of s. 24, sub-s. 5, of the Act of 1925, for the purpose of enabling all persons concerned to have precise information as to what machinery and plant falls within the classes specified as above, a statement was prepared by a committee appointed by the Minister of Health, and the statement was confirmed by him by the Plant and Machinery (Valuation for Rating) Order, 1927 (S. R. & O. 1927, No. 480).

On April 1, 1933, the premises as a whole constituting the mill, including the basement which was let to the Yorkshire Dyeing & Proofing Co., Ld., as a separate hereditament, were assessed in the Valuation List for the rating area of Middleton and therein described as industrial hereditaments. On that date the Company proposed as an amendment of the Valuation List that the basement should be separately assessed and that the net annual and rateable values of the mill should be reduced to a nominal amount. The Assessment Committee assented to the separate assessment of the basement, but refused to reduce the valuation of the rest of the mill and insisted that it was in the beneficial occupation of the Company. This decision was based upon a hypothetical clearance of the plant and machinery from the mill and upon the letting value of the premises so cleared for other purposes, including their use as a warehouse.

The Company appealed to Quarter Sessions for the County of Lancaster. The appeal was heard by the committee appointed under s. 32 of the Rating and Valuation Act, 1925.

The Committee of Quarter Sessions held that the Company was in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery, accessories thereto, and loose chattels. The appeal was therefore dismissed, but at the instance of the Company a special case was stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, for the opinion of the High Court of Justice. The question for the opinion of the Court was whether Quarter Sessions had come to a correct determination and decision in point of law. The case was heard by Lord Hewart C.J. and Hawke and Lawrence JJ. The Lord Chief Justice held that the mill could not be rateable as a warehouse for machinery some of which was part of the warehouse itself by virtue of s. 24, sub-s. 1 (*a*), of the Rating

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and Valuation Act, 1925, and the rest of which was of a value which could not be taken into account for the purpose of rating by virtue of s. 24, sub-s. 1 (*b*), of the Act. Hawke and Lawrence JJ. agreed, and the appeal was allowed. (1)

The Assessment Committee appealed to the Court of Appeal. That Court (Greer, Slesser and Scott L.JJ.) held that apart from the Rating and Valuation Act, 1925, the mill would have been rateable within the principle of *Staley* v. *Castleton Overseers* (2), *Harter* v. *Salford Overseers* (3) recognized in *Kirby* v. *Hunslet Assessment Committee* (4); but that the Act applied to plant and machinery in a hereditament which was in use, and not to a mill which was no longer in operation. The appeal was therefore allowed. (1)

The Company appealed to this House.

1936. Nov. 16. *W. E. Tyldesley Jones K.C.* and *R. W. Leach* for the appellants. Apart from the question whether the Rating and Valuation Act, 1925, applies to machinery in a mill which has ceased working, the Court of Appeal were wrong in holding that the appellants' mill could be rated as a warehouse for the process machinery. If *Staley* v. *Castleton Overseers* (2) and *Harter* v. *Salford Overseers* (3) support the view that this mill is rateable on that ground, those cases are not law, and ought to be overruled. Fixed machinery is part of the hereditament. In *Hellawell* v. *Eastwood* (5) Parke B. laid down correctly, as might be expected, the principle upon which chattels affixed to the freehold by a tenant are removable by the tenant; but it is said that the learned judge misapplied his own principle in holding that the spinning mules in that case were removable by the tenant: see *Climie* v. *Wood* (6); *Holland* v. *Hodgson* (7); *Hobson* v. *Gorringe* (8); *Reynolds* v. *Ashby* (9); *Crossley Brothers* v. *Lee* (10); and this opinion has prevailed. But even if *Staley* v. *Castleton Overseers* (2) and *Harter* v. *Salford* (1) were originally good law, their effect has been nullified by s. 24 of the Act of 1925, the effect of which is that the process plant and machinery is either no part of the hereditament, in which case it falls under sub-s. 1 (*b*) of that section, and "no account shall be taken of the value" thereof; or it is part of the hereditament within sub-s. 1 (*a*), in which case the hypothetical tenant cannot be supposed to use a hereditament as a warehouse for part of itself. In neither view can the hereditament be rated in respect of the process plant and machinery.

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(1) [1936] 1 K. B. 585.
(2) (1864) 5 B. & S. 505.
(3) (1865) 6 B. & S. 591.
(4) [1906] A. C. 43.
(5) (1850) 6 Ex. 295.
(6) (1868) L. R. 3 Ex. 257.
(7) (1872) L. R. 7 C. P. 328.
(8) [1897] 1 Ch. 182.
(9) [1904] A. C. 466.
(10) [1908] 1 K. B. 86.

The reasons given by the Court of Appeal are insufficient to support the conclusion that the Act of 1925 does not apply to a silent mill. Prima facie it applies to hereditaments whether in active use or out of work; but further, the language of the Act indicates an intention to include all hereditaments which are not valued on what is known as the "profits basis." But for this erroneous view of the scope of the Act the Court of Appeal would have affirmed the opinion of the King's Bench Division which, it is submitted, was right and ought to be affirmed.

1936. Nov. 26. *W. T. Monckton K.C.*, *A. M. Trustram Eve K.C.* and *F. Bancroft Turner* for the respondents. It is too late to question the decisions in *Staley* v. *Castleton Overseers* (2) and *Harter* v. *Salford Overseers.* (1) They have been approved in this House in *Kirby* v. *Hunslet Union Assessment Committee.* (3)

The argument for the appellants ascribes a wrong intention to s. 24, sub-s. 1 (*b*), of the Rating and Valuation Act, 1925. The intention of the Legislature was not to alter the law in *Staley* v. *Castleton Overseers* (2) and *Harter* v. *Salford Overseers* (1), but to alter the law laid down in *Reg.* v. *Lee* (4), *Laing* v. *Bishopswearmouth* (5) and *Tyne Boilerworks Co.* v. *Overseers of Longbenton.* (6) The last named cases decided that machines not fixed to the soil, but resting thereon by their own weight, were "to be taken into account" in assessing the annual value of a hereditament, such as a factory or a mill, as if the machines were part of the hereditament. They were treated as tenant's capital, apart altogether from the question whether they were fixtures either in the sense of passing on a mortgage or as being distrainable for rent in arrear. And there was good reason for so treating them, for the hypothetical tenant would be prepared to pay a higher rent for a well equipped tenement than he would give for the bare land and fixtures strictly so called. Sect. 24, sub-s. 1 (*b*), now provides that no account shall any longer be taken of the value of this process machinery, but it nowhere says that no account is to be taken of its existence, or that the hereditament is no longer to be treated as a warehouse for such machinery. The sub-section was passed with an entirely different purpose, and *Staley* v. *Castleton Overseers* (1), *Harter* v. *Salford Overseers* (2) and *Kirby* v. *Hunslet Assessment Committee* (3) are still good law and apply to the facts of this case. *Rex* v. *Melladew* (4) and *Borwick* v. *Southwark Corporation* (5) support the decision of Quarter Sessions.

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(1) 6 B. & S. 591.
(2) 5 B. & S. 505.
(3) [1906] A. C. 43.
(4) (1866) L. R. 1 Q. B. 241.
(5) (1878) 3 Q. B. D. 299.
(6) (1886) 18 Q. B. D. 81.

Tyldesley Jones K.C. replied.

The House took time for consideration.

1936. Dec. 17. LORD BLANESBURGH. My Lords, I have had the advantage of reading the opinion which is about to be pronounced by my noble and learned friend Lord Russell of Killowen. I agree entirely with it, and with the motions with which it concludes.

LORD RUSSELL OF KILLOWEN. My Lords, the question here in debate is the measure of the rateability of the owners of premises (formerly, but no longer, carried on as a cotton spinning mill), in respect of their alleged occupation thereof.

The arguments on both sides fall into two divisions: the first consisting of arguments as to the law which should govern the matter irrespective of the provisions of s. 24 of

(1) 5 B. & S. 505.
(2) 6 B. & S. 591.
(3) [1906] A. C. 43.
(4) [1907] 1 K. B. 192.
(5) [1909] 1 K. B. 78.

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the Rating and Valuation Act, 1925. These involve a consideration of the extent of the ground covered by certain old decisions such as *Staley* v. *Castleton Overseers* (1) and *Harter* v. *Salford Overseers* (2), under which people have been rated in respect of their occupation of silent factories for the purpose of housing machinery therein, and also the correctness of those decisions. The second division consists of arguments as to whether the before-mentioned section applies to the present case and operates to render unnecessary the consideration of the earlier decisions.

The section finds its place in a long Act which embraces within its provisions the law as to rating and valuation which is to prevail when and where the Act applies. The relevant provision of s. 24 is sub-s. 1, which runs thus :—

"For the purpose of the making or revision of valuation lists under this Part of this Act, the following provisions shall have effect with respect to the valuation of any hereditament other than a hereditament the value of which is ascertained by reference to the accounts, receipts or profits of the undertaking carried on therein :—

(*a*) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in the Third Schedule to this Act shall be deemed to be a part of the hereditament.

(*b*) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament."

The Third Schedule is in the following terms :—

"THIRD SCHEDULE.

CLASSES OF MACHINERY AND PLANT TO BE DEEMED TO BE PART OF THE HEREDITAMENT.

1. Machinery and plant (together with the shafting, pipes, cables, wires, and other appliances and structures accessory thereto) which is used or intended to be used, mainly or exclusively in connection with any of the following purposes, that is to say :—

(*a*) the generation, storage, primary transformation or

(1) 5 B. & S. 505.

(2) 6 B. & S. 591.

main transmission of power in or on the hereditament; or

(*b*) the heating, cooling, ventilating, lighting, draining, or supplying of water to the land or buildings of which the hereditament consists, or the protecting of the hereditament from fire:

Provided that, in the case of machinery or plant which is in or on the hereditament for the purpose of manufacturing operations or trade processes, the fact that it is used in connection with those operations or processes for the purpose of heating, cooling, ventilating, lighting, supplying water, or protecting from fire shall not cause it to be treated as falling within the classes of machinery or plant specified in this Schedule.

2. Lifts and elevators mainly or usually used for passengers.

3. Railway and tramway lines and tracks.

4. Such part of any plant or any combination of plant and machinery, including gas holders, blast furnaces, coke ovens, tar distilling plant, cupolas, water towers with tanks, as is, or is in the nature of, a building or structure."

The plant and machinery referred to in sub-s. 1 (*a*) include plant and machinery whose function is, not to execute any manufacturing operation or trade process, but to generate and transmit power to, or to warm, or cool, or ventilate, or light, etc., the hereditaments in question. They may be conveniently called "motive plant and machinery," while manufacturing or trade process plant and machinery may be conveniently referred to as "process plant and machinery."

In the present case the condition of this silent cotton mill as regards its contents was on April 1, 1933 (the relevant date) as follows:—The whole floor space of the mill was 23,408 square yards, of which 2409 square yards were occupied by the motive plant and machinery. A further 2105 square yards were let off and were in separate rateable occupation. We are not concerned with that part of the mill. The remaining floor space, namely, 18,894 square yards, was fully occupied by process plant and machinery and certain accessories thereto. As to the accessories both parties agree

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that these are part of the process plant and machinery and are not separately in issue. In addition, the mill contained some chattels of little value. The parties have agreed that in so far as the hereditament is being occupied for the purpose of housing those loose chattels, the appellants shall be rated in respect of that occupation upon the footing of a 7*l.* rateable value. I might add, though the fact is irrelevant to the question of the statute, that the process plant and machinery is nearly all physically fixed to the hereditament, and so far as not so fixed it consists of machines fixed by their own weights which vary from 21 cwt. to 115 cwt.

The Assessment Committee fixed the net annual value of the property for rating purposes at 1437*l.*, which they declined to alter, except to the extent of treating the portion which had been let off as a separate hereditament and assessing it accordingly. The appellants appealed to Quarter Sessions. The committee of justices appointed for that purpose heard the appeal, and held that there was no beneficial occupation of the hereditament as a cotton mill, but they held that the appellants " were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery, accessories thereto and loose chattels." Quarter Sessions thereupon dismissed the appeal with costs, but stated a case for the opinion of the High Court.

By an order of the King's Bench Division dated June 20, 1935, it was ordered that the order of Quarter Sessions "be set aside and judgment entered for the appellants at Quarter Sessions that the rateable value of the premises of the appellants be assessed at the agreed sum of 7*l.* with costs."

The judgment of the Divisional Court was based solely upon the interpretation of s. 24 of the Act of 1925.

The Lord Chief Justice (with whom Hawke and Lawrence JJ. agreed) thought that on the construction of s. 24 the matter was plain, and that on its clear language the object of the section was to get rid of the old doctrine that although machinery not forming part of a hereditament could not be rated, nevertheless the rateable value of a hereditament was to be enhanced by reference to the machinery which was

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in it, and which made it appropriate to the particular industry carried on therein. Under the section motive plant and machinery is to be deemed part of the hereditament which is being valued; as to process plant and machinery, no account is to be taken of its value with respect to the valuation of the hereditament.

My Lords, I agree with the opinion of the Lord Chief Justice. It was said that the section only referred to the *value* of the process plant and machinery, and did not forbid the taking into account its existence and presence in the hereditament; and that accordingly the section in no way interfered with the application of the old authorities, with the result that the appellants could be rated in respect of their occupation of the hereditament for the purpose of housing the process plant and machinery. This contention is too subtle for me; for I am unable to see how the value of the occupation for this purpose to a hypothetical tenant can be assessed without some consideration of the value of the plant and machinery housed. Indeed, that this is so appears from the case stated, in which occurs this passage:— "The capital value of the loose chattels on the premises was very small and the rent which a hypothetical tenant would pay to store them would be insignificant."

I would paraphrase s. 24, sub-s. 1, in its application to the present case thus: with respect to the valuation of the appellants' hereditament, no account shall be taken of the value of any plant or machinery in or on the hereditament, except that all motive plant and machinery in or on the hereditament shall be deemed to be a part of the hereditament. In my opinion, assuming that the section applies to the present case, the decision of the King's Bench Division was right.

The case was there decided upon the footing that the section did apply. Indeed no one suggested the contrary view. In the Court of Appeal the suggestion seems to have been made for the first time per curiam that the section did not apply to the case of a silent mill. In the result that view prevailed, the appeal being allowed and the order of

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Quarter Sessions being restored. Greer L.J. stated that unless the Act of 1925 had made a difference, it was clear on the authorities that the present appellants were in rateable occupation of the mill, and that "Quarter Sessions were entitled to take into account that they were in beneficial occupation in respect of the preservation of the process machinery pending either the sale or lease of the property or the removal for sale of the process machinery." He then considered the effect of the Act of 1925. He does not hold that the section does not apply, but he remarks as to its construction: "I am satisfied that the intention of the section was not in any way to effect any alteration in the law as laid down in *Staley* v. *Castleton Overseers* (1) and *Harter* v. *Salford Overseers*. (2)" As to this, my Lords, I can only say that the intention of an Act of Parliament must appear from the language used therein, and I can find nothing in the context here to justify the conclusion reached by the Lord Justice.

Slesser L.J. held that apart from the Act of 1925 the hereditament, regarded as a warehouse, would have been rateable as such. Proceeding to consider s. 24 he said that it makes a clear dichotomy between motive machinery and process machinery, a distinction which he says (for some unexplained reason) is appropriate to machinery in use. He then proceeds to inquire, as he expresses it, "whether the language used is such that this division into motive and process machinery . . . . has in fact been made to apply by compulsion of language to the case of machinery permanently out of commission." He holds that the language used has no such effect; and as I read his judgment the only specific language in the enactment upon which his view is based consists of the following expressions which are to be found in the Third Schedule, namely, "which is used or intended to be used," "the fact that it is used" and "mainly or usually used."

The Lord Justice, it seems to me, errs in two regards. There is no dichotomy or division into motive machinery and process machinery, nor does the section deal with factories alone. It applies to all hereditaments (with only one excepted class), and it provides with respect to the valuation of every hereditament to which it applies, that no account shall be taken of the value of any plant or machinery therein or thereon, subject however to the provision that "motive plant and machinery" (which, be it observed, may be found in a private house) shall be deemed to be a part of the hereditament. Further, the expressions as to user contained in the Third Schedule do not in my opinion justify the view that the words "any hereditament" do not include a hereditament which is a silent mill. The Third Schedule is concerned solely with classes of machinery; and surely it cannot be right to say that a cotton spinning machine in motion, and a cotton spinning machine at rest, belong to different classes of machinery. On the other hand, the expressions as to user (actual or intended), indicating the sole user, or the normal or principal user of machines, contain true indicia of classes, and are framed in the present tense without necessarily postulating that the machinery should in fact be in operation.

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(1) 5 B. & S. 505.

(2) 6 B. & S. 591.

Scott L.J. also held that s. 24 had no application to the case. He treats the section as if it were confined to factories. He says, "The fact that the building was once a working factory, and may still in popular language be called 'a cotton mill,' is not enough to bring it within the section." And relying on what he conceives to have been the intention of the Legislature, namely, to remedy a grievance felt by manufacturers as a result of the decision of your Lordships' House nineteen years before in the *Hunslet* case (1), and relying also upon the words as to user which occur in the Third Schedule to the Act of 1925, he reaches the conclusion that s. 24 cannot apply. Here again the fact seems not to be appreciated that the section is not directed to factories only, but is a general section applicable in terms to the valuation of every hereditament which is not valued on what is commonly known as the profits basis. It cannot be a question whether a silent factory, though a factory, can be "brought" within the section. It is a hereditament which does not fall to be valued on the profits basis, and is therefore necessarily within the section.

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(1) [1906] A. C. 43.

For myself, I can see no escape from the plain language of the section. It applies to the present case, and operates to forbid a valuation of the hereditament on the footing of its being used for the purpose of housing the process plant and machinery. Indeed if the section does not apply, I cannot see why in this case an additional value was not placed upon the hereditament, by reason of its being used for the purpose of housing the motive plant and machinery as well.

Since the section applies and operates as indicated above, it becomes unnecessary to express any final view upon the arguments comprised in what I have called the first division of the arguments. I desire however, to keep open the questions (1.) whether *Staley* v. *Castleton Overseers* (1) and *Harter* v. *Salford Overseers* (2) were correctly decided except in regard to loose chattels; (2.) whether *Borwick* v. *Southwark Corporation* (3) was correctly decided; and (3.) whether the practice of treating the owner of an empty house as not being rateable is in truth an exception from the general law of rating.

In my opinion this appeal should succeed, the order of the King's Bench Division should be restored, and the appellants should have their costs throughout; and I move your Lordships accordingly.

LORD ALNESS. My Lords, the following is the opinion of my noble and learned friend Lord Maugham, which I have been asked to read.

LORD MAUGHAM (read by LORD ALNESS). My Lords, in this appeal there has been a somewhat remarkable difference of judicial opinion. The question involved is as to the measure of rateability of the appellants as the owners of premises, till recently carried on as a cotton spinning mill, for the rating year beginning on April 1, 1933. Before that date the appellants appeared in the valuation list of the rating area of Middleton as in rateable occupation of the premises as a cotton mill and industrial hereditament with a net annual value of 1437*l.* and a rateable value of 359*l.* In the month of September, 1931, the appellants closed down the mill. In August, 1932, they sold the mill stores and shortly afterwards they stripped the rovings from the bobbins for sale to a waste dealer. In February, 1933, they ceased to occupy the offices of the premises for any purpose; on April 1, 1933, the only person employed on the premises was the engineer, who was employed to look after the machinery at a salary of 2*l.* 12*s.* 6*d.* per week as against his previous salary of 6*l.* It is therefore not surprising that a proposal was made to the respondents for an amendment of the valuation list. This was acceded to in so far as the appellants sought to obtain a valuation as a separate hereditament of the basement of the premises which had been let off and was in the occupation of the Yorkshire Dyeing and Proofing Co., Ld.; but was wholly refused as regards a proposal that the valuation of the remaining premises should be reduced to nil. The appellants appealed to Quarter Sessions, but the Quarter Sessions Rating Appeal Committee dismissed the appeal; the Committee of Justices being of opinion that "the appellants were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery, accessories thereto and loose chattels." The appellants on a Case Stated appealed to the High Court and a Divisional Court consisting of the Lord Chief Justice of England and Hawke and Lawrence JJ. allowed the appeal, holding that the amount of the assessment should be reduced to the figure of 7*l.* being a figure agreed between the parties for the purposes of the appeal as the rent which a hypothetical tenant would pay for the storage of certain loose chattels which remained upon the premises. The respondents then appealed by leave to the Court of Appeal, and that Court, consisting of Lords Justices Greer, Slesser, and Scott, allowed the appeal, holding that Quarter Sessions had come to a correct determination and decision in point of law. Hence, with leave given by the Court of Appeal, the present appeal.

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(1) 5 B. & S. 505.
(2) 6 B. & S. 591.
(3) [1909] 1 K. B. 78.

The facts as found by the Justices in the Case Stated are comparatively simple. In addition to the facts above stated the following findings are material :—

(1.) The floor space occupied by the process plant and machinery would have been suitable and available if it had not been occupied by process plant and machinery for warehousing or other purposes, but in some cases adaptation or alteration of the premises would have been necessary but not to any substantial extent.

(2.) The hereditament was occupied by the appellants to some extent for the purpose of keeping the plant and machinery in repair and good condition.

(3.) It was of benefit to the appellants, as owners of the building, plant and machinery, that the plant and machinery should remain on the premises and be preserved from depreciation.

(4.) The capital value of the loose chattels was very small and the rent which a hypothetical tenant would pay to store them was insignificant. (It was subsequently agreed to be *7l.*)

(5.) Save as aforesaid there was no user of the hereditament.

(6.) There was no beneficial occupation of the hereditament as a cotton mill.

The Justices, as above stated, were of opinion and held that the appellants were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery, accessories thereto, and loose chattels, and they on that ground dismissed the appeal.

My Lords, two main questions arise on this appeal. First, it is contended that by virtue of s. 24, sub-s. 1, of the Rating and Valuation Act, 1925, all the plant or machinery in or on the hereditament which does not belong to any of the classes specified in the Third Schedule to the Act (now replaced by a Schedule contained in the Plant and Machinery (Valuation for Rating) Order, 1927) must be disregarded in making a valuation for rating purposes. Secondly, it is contended that if this view is unsound the valuation still cannot stand, since, apart from a few loose chattels, practically all the plant and machinery on the premises were fixtures and accordingly formed part of the hereditament, and it was urged, with at least plausibility, that the hypothetical tenant could not be imagined as paying a rent for storing or warehousing part of the hereditament itself.

My Lords, in the Divisional Court the first contention was successful, and it became unnecessary to consider the second. In the Court of Appeal both contentions failed. After very careful consideration of the judgments in the two Courts I feel constrained, with the greatest respect for the opinions of those from whose views I differ, to agree with the opinion expressed by the Lord Chief Justice in the Divisional Court and concurred in by Hawke and Lawrence JJ. Out of respect for the Court of Appeal I shall endeavour to express the reasons for my conclusion.

My Lords, it will be useful first to consider the position of the hereditament in question from the point of view of rating as it was before the Act of 1925. There is no doubt that in order to prove rateable occupation it was necessary to establish not only occupation, but that the occupation was a thing of value: *Liverpool Corporation* v. *Chorley Union Assessment Committee.* (1) It was equally clear that if liability to the rate was established, the basis of assessment (in general) was that prescribed by the Parochial Assessments Act, 1836, that is, the "rateable value" was the sum estimated to represent the rent at which the hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes and tithe rentcharge, if any, and to bear the cost of repairs and insurance and other expenses, if any, necessary to maintain the hereditament in a state to command that rent. "The gross estimated rental" was estimated in the same way, but without the deduction for repairs, insurance, or expenses necessary for maintenance. There was thus a hypothetical tenant and a hypothetical rent, but I think a real and concrete hereditament.

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(1) [1913] A. C. 197.

It was necessary to take into consideration all possible tenants, including the actual occupier and even the owner. The hypothetical tenant was assumed to be a tenant from year to year with a reasonable prospect of continuing in occupation; but the hypothetical rent which the tenant could give was estimated with reference to the hereditament in its actual physical condition (rebus sic stantibus), and a continuance of the existing state of things was prima facie to be presumed. In my opinion it is possible to make very wide assumptions as to the hypothetical tenant if these propositions are borne in mind; but it is not legitimate to fix a rateable value for a hereditament at a figure in excess of a nominal amount unless it can be shown that the hypothetical tenant might fairly be expected to pay a larger rent.

There were some special considerations which were long ago established in relation to hereditaments, such as factories, equipped with machinery and plant. It was held that machinery and plant, in use for the purpose of the factory, whether or not affixed to the freehold, or whether or not to be regarded as landlord's fixtures or tenant's fixtures, were to be taken into consideration in assessing the rateable value, on the assumption that the hypothetical tenant would pay a rent based on the premises in their actual state of equipment. These authorities were considered in this House in the case of *Kirby* v. *Hunslet Union Assessment Committee* (1), and the House considered that it was bound to follow the long line of decisions in favour of this proposition. Lord Macnaghten quoted with approval an observation made by Lord Campbell that it was of the greatest importance that a rule upon such a subject, which had been laid down and acted upon, should be adhered to. That rule applied to mills and factories as going concerns, but there was another doctrine as regards mills, factories and other like buildings with plant and machinery in them which for some reason were not working or operative concerns. This rule was laid down in relation to mills which had ceased to work owing to the impossibility of procuring cotton from the Southern States of America

(1) [1906] A. C. 43.

during the American civil war. The two cases are *Staley* v. *Castleton Overseers* (1), and *Harter* v. *Salford Overseers.* (2) In the first case it was held that the owners were rateable as regards the mill as if it were a warehouse for storing the machinery and plant actually in the mill. Mr. Tyldesley Jones argued that that case did not decide that the plant and machinery which were fixed to the hereditament and consequently formed a part of it could be regarded as stored by the hypothetical tenant. A comparison of the various reports of the case certainly tends to throw doubt on the scope of the decision. On the other hand the case of *Harter* v. *Salford Overseers* (2) decided in the following year was treated by the learned judges of the King's Bench as indistinguishable from the former case; and I am of opinion that the decision in the latter case necessarily involves the proposition that it was correct to treat the building as let to the hypothetical tenant as a warehouse not only for the loose chattels but also for the plant and machinery necessary for the working of the mill. I think the plant and machinery so deemed to be stored included tenant's fixtures, or fixtures usually so described, removable during the term of the lease. The report is not clear on the question whether landlord's fixtures ought also to be taken into account. It should be added that the assumption is not that the hereditament is being let from year to year to a tenant carrying on the business of warehousing the goods of others for reward. A continuance of the existing state of things is assumed. The hypothetical tenant is supposed to be paying a rent for the right to store merely the plant and machinery which are actually on the premises, and they, it would seem, are assumed for this purpose to belong to him.

It is not evident that fixed machinery and plant of the nature of landlord's fixtures could properly be regarded as being stored by the hypothetical tenant; nor is it easy to see what distinction could be drawn between landlord's fixtures and tenant's fixtures from the point of view of the rateability of the occupier in respect of the hereditament, if

(1) 5 B. & S. 505.

(2) 6 B. & S. 591.

we hold to the doctrine that the valuation must proceed on the actual physical state of premises at the time, so that we ought not to suppose an imaginary severance of fixtures from the hereditament. We were accordingly invited to be strictly logical, and to reverse these long established decisions, so far as they related to fixtures, if we were unable to explain, and a fortiori if we were unable to understand them. For the reason already indicated I should hesitate a long time before acceding to this invitation.

My Lords, it was doubtless with an accurate knowledge of the state of the law in regard to plant or machinery in or on a building as affecting its rateable value that s. 24 was inserted in the Rating and Valuation Act, 1925. I need not repeat the section in full. Treating the plant or machinery belonging to any of the classes specified in the Third Schedule (or in the substituted Schedule) as being sufficiently described as "power machinery," and all other plant and machinery in or on the hereditament as being "process machinery" (I use the terms only for brevity), the section in effect provides "with respect to the valuation of any hereditament" (with an exception which I shall notice later), (*a*) that power machinery (and I add whether loose or fixed) is to be "deemed to be a part of the hereditament," and (*b*) "subject as aforesaid, no account shall be taken of the value of" any process machinery (and again I add whether loose or fixed). The question on which opinions have so widely differed is simply this, does the section apply only to the case where the hereditament contains what may conveniently be called active machinery, that is, does it merely alter the law laid down in the numerous cases which were finally approved by this House in the *Hunslet* case (1), or does it also apply to the case where the hereditament containing machinery not in use (e.g. a silent mill) is being rated on what may be called the warehouse principle, that is, does it also affect the quantum of valuation as laid down in *Staley* v. *Castleton Overseers* (2) and *Harter* v. *Salford Overseers*? (3)

(1) [1906] A. C. 43.
(2) 5 B. & S. 505.
(3) 6 B. & S. 591.

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My Lords, I must observe in the first place that no problem arises here as to rateable occupation. It is admitted that the appellants are occupiers and that to the extent of the loose chattels there is a beneficial occupation. The dispute is merely as to the quantum of rateable value. That however is the precise subject matter of s. 24, and prima facie it seems to me that the language of the section covers the case of valuation on the warehouse basis. The section applies to any hereditament with a single exception, that of a hereditament which is being valued for rating on a profits basis. What sufficient reason is there for implying another exception, which might have been very simply expressed? It is not immaterial to note that the section is to be found in a lengthy statute which is designed in many respects to amend and simplify the law as to the making and collection of rates. Part II. of the Act is devoted to the subject of valuation. Sect. 22 contains elaborate provisions for the ascertainment of rateable value. Sect. 23 provides for the assessment of buildings occupied in parts. Both these sections are of general application. Then comes s. 24 as to the valuation of any hereditament which happens to contain any plant or machinery. It is not confined to mills and factories, and it seems to me therefore to do considerably more than merely to alter the law as approved in the *Hunslet* case. (1) It was suggested that the words "no account shall be taken of the value," etc., do not mean "no account shall be taken of the *presence*," etc.; but, after all, the section is only dealing with values of machinery and plant for the purpose of fixing the rateable value of the hereditament under s. 22, sub-s. 1 (*c*), of the Act. It may be added that the "gross value" is to be ascertained according to a definition contained in s. 65 which repeats the definition contained in the Parochial Assessments Act, 1836 (the whole of which is now repealed). If certain machinery is treated as of no value for the purpose of rating it cannot in my view serve to inflate the rateable value even on the warehousing basis. Moreover in the place where it is found I think we ought naturally to conclude that s. 24 is intended, subject only to the express exception, to form a code for the valuation of any hereditament containing any plant or machinery whether it is or is not in actual use.

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(1) [1906] A. C. 43.

My Lords, for these reasons including those given by the Lord Chief Justice I am of opinion that the appeal at Quarter Sessions should have been allowed and that the figure in the assessment should have been reduced to the agreed figure of 7*l.* I therefore concur in the proposed resolution.

Order of the Court of Appeal complained of reversed: Order of the King's Bench Division thereby set aside restored. Ordered that the respondents do pay to the appellants the costs incurred by them in the Courts below and also their costs of the appeal to this House. Ordered that the cause be remitted back to the King's Bench Division of the High Court of Justice, to do therein as shall be just and consistent with this judgment.

Lords' Journals, Dec. 17, 1936.

Solicitors for appellants: *Gregory, Rowcliffe & Co., for John Taylor & Co., Blackburn and Manchester.*

Solicitors for respondents: *Gibson & Weldon, for Megson & Nicholson, Oldham.*

[HOUSE OF LORDS.]

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1937

March 15.

WRAGG . . . . APPELLANT;

AND

SAMUEL FOX AND COMPANY, LIMITED . . . . RESPONDENTS.

CHARLESWORTH . . . . APPELLANT;

AND

SAMUEL FOX AND COMPANY, LIMITED . . . . RESPONDENTS.

Workmen's Compensation—Notional accident from industrial disease—Silicosis—Effect of Silicosis Scheme, 1934, on *Scheme of* 1931—*Process directed to be added to processes specified in para.* 2—*Insertion as additional sub-paragraph—Not after any particular sub-paragraph—Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 47—*Various Industries* (*Silicosis*) *Scheme,* 1931 (*S. R. & O.* 1931, *No.* 342), *para.* 2—*Various Industries* (*Silicosis*) *Amendment Scheme,* 1934 (*S. R. & O.* 1934, *No.* 1155).

The Various Industries (Silicosis) Scheme, 1931, specified in eight sub-paragraphs to para. 2 the processes with regard to which the Scheme should apply to all workmen employed in such processes. The Various Industries (Silicosis) Amendment Scheme, 1934, directed that the Scheme of 1931 should be amended and take effect as if the processes specified in para. 2 of the said Scheme as the processes to employment in which the Scheme should apply, included: "Any operation underground in any coal mine":—

Held, that the amendment must take the form of an additional sub-paragraph to para. 2 of the Scheme of 1931 and could not be inserted after any particular sub-paragraph of para. 2; consequently the amendment made in 1934 was not subject to the proviso to sub-para. (iii.) of para. 2, under which the employer was freed from liability where he proved that the workman had not been exposed to the dust of silica rock.

Orders of the Court of Appeal [1936] 1 K. B. 440 set aside and the orders of the county court judge restored.

THE following is a statement of the facts together with the material parts of the Workmen's Compensation Act, 1925, and the Various Industries (Silicosis) Scheme, 1931, and the

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* *Present:* LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD ROCHE.

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v.
SAMUEL
FOX & CO.
CHARLESWORTH
v.
SAME.

Various Industries (Silicosis) Amendment Scheme, 1934, as stated in the judgment of Lord Thankerton.

[The essential facts in the case of Charlesworth were the same as those in the case of Wragg.]

The appellant Wragg was employed by the respondents for forty-one years up to April 19, 1935, the last twenty years of this time being spent in underground work, heading and ripping on alternate days. For the last few years of his life the appellant experienced what he called "tightness" and finally ceased work on April 19, 1935. He was examined by the Medical Board appointed for that purpose and on June 21, 1935, he was duly certified as suffering from silicosis and as totally incapacitated. The commencement of the disablement was certified as April 19, 1935. The appellant applied for arbitration on August 16, 1935, and the respondents filed their answer denying liability. On November 4, 1935, the county court judge made an award in the appellant's favour, which, on appeal, was set aside by the Court of Appeal on December 10, 1935.

The Silicosis Scheme in question was made by the Secretary of State by virtue of the provisions of s. 47 of the Workmen's Compensation Act, 1925, as amended by the Workmen's Compensation (Silicosis and Asbestosis) Act, 1930. The material parts of the section as so amended are as follows:—

"47.—(1.) The Secretary of State may by scheme provide for the payment of compensation by the employers of workmen in any specified industry or process or group of industries or processes involving exposure to silica dust or asbestos dust—

(*a*) who are certified in such manner as may be prescribed by the scheme to have suffered death or total disablement from the disease known as 'silicosis' (that is to say, fibrosis of the lungs due to silica dust) or from fibrosis of the lungs due to asbestos dust, or from either of those diseases accompanied by tuberculosis;

. . . .

(3.) Provision may be made by the scheme—

. . . .

(*f*) for the application with the necessary modifications of any of the provisions of this Act, or of any enactment relating to compensation thereunder, and for defining the industries or processes to which the scheme applies, and generally for such further or supplemental matters, including provisions as to the determination of disputes arising between employers and the authority administering the fund, as appear necessary for giving full effect to the scheme.

(4.) Any scheme made under this section may be extended or varied by any subsequent scheme made in the like manner, and shall have effect as if enacted in this Act, but any scheme made under this section shall be laid before each House of Parliament forthwith, and, if an address is presented to His Majesty by either House of Parliament within the next subsequent twenty-one days on which that House sits next after any such scheme is laid before it praying that the scheme may be annulled, His Majesty in Council may annul the scheme, and it shall thenceforward be void, but without prejudice to the validity of anything done thereunder."

The question in the appeal is whether the appellant was employed in one of the processes to which the Various Industries (Silicosis) Scheme, 1931, as amended in 1934, applied, and it will be necessary to consider the relevant parts of this Scheme. Paras. 2 to 5 of the Various Industries (Silicosis) Scheme, 1931, provide as follows :—

" 2. *Application of Scheme.*—This Scheme shall apply to all workmen employed at any time on or after the commencement of this Scheme in any of the following processes :—

(i.) mining and quarrying of silica rock ;

For the purposes of this Scheme silica rock means quartz, quartzite, ganister, sandstone, gritstone and chert, but does not include natural sand or rotten rock ;

(ii.) drilling and blasting in silica rock, in or incidental to the mining or quarrying of other minerals ;

(iii.) in addition to and not in derogation of the provisions of the foregoing paragraph, the following processes :—

(*a*) drilling or blasting in stone in any sinking pit or staple pit or in any cross measure drift or stone drift or other strait or narrow working in any coal mine, or any handling or moving of stone at the working places where these processes are carried on ;

(*b*) operating or assisting in the operation of any power-driven machine used for drilling, cutting, ripping or breaking stone in any coal mine.

Provided that the employer shall not be liable under this paragraph in any case where he proves to the satisfaction of the county court judge or other arbitrator that the workman has not, during the employment to which the disease is alleged to be due, been exposed to the dust of silica rock ;

(iv.) sawing, planing, dressing, shaping, cutting or carving of silica rock ;

(v.) breaking, crushing, grinding, sieving, mixing or packing of silica rock, or of dried quartzose sand or any dry deposit or dry residue of silica or any dry admixture containing such materials ; or any process ancillary thereto ;

(vi.) handling or moving of silica rock, or of dried quartzose sand or any dry deposit or dry residue of silica, in or incidental to the processes mentioned in the foregoing paragraphs ;

(vii.) breaking, crushing or grinding of flint or materials containing ground flint ; or handling, moving, sieving, mixing or packing of broken, crushed or ground flint or materials containing such flint ;

(viii.) in the undermentioned trades, the processes specified and those processes only, namely :—

Foundries and metal works :—

(*a*) in works engaged in the manufacture of steel or in steel foundries ; crushing or grinding of silica rock or any handling incidental to such crushing or grinding, or crushing or grinding of bricks or other articles containing not less than 80 per cent. total silica (SiO_2) ;

(*b*) freeing of steel castings from adherent sand or other siliceous substance, excepting work done upon the foundry floor ;

(*c*) sandblasting of metal or articles of metal by means of compressed air with the use of quartzose sand or crushed silica rock or flint ;

The getting and manipulation of granite (including any igneous rock) :—

The dressing of stone by masons for building, civil engineering, or monumental purposes, but not kerb dressing if the workman is wholly or mainly employed on such work.

Potteries :—

(*a*) the milling of flint or crushing or grinding of silica rock or dried quartzose sand ;

(*b*) any process in or incidental to the manufacture of china or earthenware including sanitary earthenware, electrical earthenware, and earthenware tiles, up to and including the preparation for glazing but excluding underglaze decorating, and modelling and mould-making where these processes are carried on in separate rooms ;

(*c*) polishing, sorting or grinding on a power driven wheel in connection with the grinding of glost ware, and tile-slabbing.

Tin Mines :—

(*a*) any operation underground ;

(*b*) breaking or crushing of the ore or the containing rock above-ground or any handling or moving incidental thereto.

Provided that nothing in this Scheme shall apply to the employment of a workman in any process included in the Refractories Industries (Silicosis) Scheme, 1931 (1), the Metal Grinding Industries (Silicosis) Scheme, 1931 (2), or the Sandstone Industry (Silicosis) Scheme, 1931. (3)

3. *Definitions.*—In this Scheme, unless the context otherwise requires :—

'Processes' means any of the processes mentioned in paragraph 2.

'The Act' means the Workmen's Compensation Act, 1925.

The expressions 'employer,' 'workmen,' and 'dependants' have the same meanings as in the Act.

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(1) S. R. & O. 1931, No. 345.

(2) S. R. & O. 1931, No. 343.

(3) S. R. & O. 1931, No. 346.

'Medical Board' means the Medical Board appointed by the Secretary of State under the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931. (1)

'Prescribed' means prescribed by the Secretary of State.

'Tuberculosis' means tuberculosis of the lungs.

PART I.—RIGHT TO COMPENSATION.

4. Where the Medical Board certify :—

(1.) that the death of a workman has been caused by silicosis or by silicosis accompanied by tuberculosis ; or

(2.) that a workman is totally disabled from silicosis or from silicosis accompanied by tuberculosis ; or

(3.) that a workman, though not totally disabled, is suffering from silicosis or from silicosis accompanied by tuberculosis to such a degree as to make it dangerous for him to continue work in the processes, and is for that reason suspended from employment ;

and where the disease is due to employment in the processes whether under one or more employers, the workman or his dependants, as the case may be, shall be entitled to claim compensation as if the disease as aforesaid were a personal injury by accident arising out of and in the course of that employment, as provided by the Act, but subject to the modifications hereinafter contained.

Provided that no compensation shall be payable :—

(*a*) if the Medical Board certify that the silicosis cannot have been contracted in the processes owing to the shortness of the time during which the workman has been employed therein ;

(*b*) in cases where the workman has not been employed in the processes or has not been in receipt of weekly payments under this Scheme of the Various Industries (Silicosis) Scheme, 1928, at any time within the three years previous to the date of the injury ;

(*c*) in cases where the workman, or his dependants, as the case may be, are in receipt of compensation under any other scheme or enactment providing compensation for silicosis or asbestosis whether in Great Britain or elsewhere.

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(1) S. R. & O. 1931, No. 341.

5. If the workman has been employed in the processes for a period or periods amounting to not less than five years, the disease shall be deemed to be due to employment in the processes unless the employer proves the contrary."

The Various Industries (Silicosis) Amendment Scheme, 1934, provides as follows :—

> " In pursuance of the powers conferred on me by section 47 of the Workmen's Compensation Act, 1925, as extended by the Workmen's Compensation (Silicosis and Asbestosis) Act, 1930, I hereby direct that the Various Industries (Silicosis) Scheme, 1931 (1), shall be amended and take effect as if the processes specified in paragraph 2 of the said Scheme as the processes to employment in which the Scheme shall apply, included the following, namely :—
>
> Any operation underground in any coal mine.
>
> This Order applies to workmen employed in any such operation at any time on or after the date of this Order.
>
> This Order may be cited as the Various Industries (Silicosis) Amendment Scheme, 1934."

Hon. Sir Stafford Cripps K.C., *John Neal* and *Granville Slack* for the appellants. The proviso to sub-para. (iii.) of para. 2 of the Scheme of 1931 is a cutting down of the workmen's rights. All the judgments of the Lords Justices have the fatal defect of not taking into consideration the meaning which has been placed on the Scheme by your Lordships in *Morgan* v. *Amalgamated Anthracite Collieries, Ld.* (2) The proviso to para. 2, sub-para. (iii.), does not apply in the case of persons engaged " in any operation underground in any coal mine," and the intention and effect of the amending Order of 1934 was to ensure compensation to all men who contracted silicosis while engaged in any operation underground in any coal mine. The Order of 1934 was intended to extend the workmen's rights. If it was desired that this amendment was to be inserted in a particular place in para. 2 of the Scheme of 1931 there was no difficulty in stating where, and in other Orders that has been done, as for example the

(1) S. R. & O. 1931 (No. 342), p. 743. (2) (1935) 28 B. W. C. C. 358.

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Order of 1935. On construction, this new clause must be read in as a new additional sub-paragraph to para. 2. As to the effect of new legislation on former legislation Bovill C.J. in *Horsnail* v. *Bruce* (1) said that it was a well known rule in the construction of statutes, that, if a substantive enactment in a former Act is repealed, that which comes by way of proviso upon it is impliedly repealed also. Pollock C.B.'s judgment in *Read* v. *Storey* (2) is an authority for the same proposition. *Morgan's* case (3) shows that if rights overlap the workman can claim under more than one clause; but the Court of Appeal never considered that.

Craig Henderson K.C., F. W. Beney and *Sutton-Nelthorpe* for the respondents. The only way is to read this amendment as inserted with sub-para. (iii.) subject to the proviso. If it were inserted as the appellants suggest it would be ultra vires as not being in accordance with the Scheme of 1931: *Metropolitan Coal Co.* v. *Pye* (4); Maxwell on the Interpretation of Statutes, 7th ed., p. 144; *In re Arden and Rutter.* (5) There is nothing in *Morgan's* case (3) to prevent the employers claiming the benefit of the proviso. If this amendment is not placed in sub-para. (iii.) and placed anywhere else the effect must be to repeal sub-para. (iii.) by implication. The repeal of the proviso required clear express words and should not be by implication, but no such words are in the Scheme of 1934.

Sir Stafford Cripps in reply.

1937. March 15. LORD THANKERTON. My Lords, the only question arising in these appeals, which have been consolidated by consent, is as to the proper construction of the Various Industries (Silicosis) Scheme, 1931, as amended by the Various Industries (Silicosis) Amendment Scheme, 1934. It is agreed that the facts in the respective appeals, so far as relevant to this question, afford no ground of distinction. Both in the county court and in the Court of Appeal, the decision in the case of the appellant Charlesworth followed the decision in the case of the appellant Wragg by consent and without argument on this question. It will therefore be sufficient to refer to the facts in the case of the appellant Wragg. [His Lordship stated the facts and the material parts of the Act and Schemes as set out above.] The appellant has been duly certified under para. 4 to be totally disabled from silicosis, and, having been employed for a period of more than five years in the process, he has the benefit of the presumption under para. 5, provided that the process is one that is mentioned in para. 2. Further, the learned county court judge has found in fact that the appellant was constantly exposed to silica dust at his work, that the silicosis was due to the nature of his employment with the respondents, and that the disease could not have been contracted in any other way.

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(1) (1873) L. R. 8 C. P. 378, 385.
(2) (1861) 6 H. & N. 423; 30 L. J. (M. C.) 110.
(3) 28 B. W. C. C. 358.
(4) [1936] A. C. 343, 351.
(5) [1923] 2 K. B. 865, 873, 878.

The appellant's work of heading and ripping entailed driving through a stone termed by the geologist, who gave evidence, " mudstone," and, in addition to the use of pick and crowbar, blasting was carried out. The learned judge found that the appellant was not exposed to the dust of silica rock, which is referred to in the proviso to sub-para. (iii.) of para. 2, and he further stated " I am also satisfied that the material in which the applicant worked was not silica rock or dried quartzose sand or dry deposit or dry residue of silica or a dry admixture containing such materials, and that the applicant did not handle or move such materials. That is to say, I find that the material worked in is not within the lists contained in sub-paras. (v.) and (vi.) of para. 2 of the Scheme. I find that there was in the mudstone minute particles of free silica sporadically scattered through the mass ranging up to about 8 per cent. of the total content. There were no lenticles."

On the other hand, it is clear that the appellant was employed in an operation underground in a coal mine; but the respondents maintain that the amendment made in 1934 is subject to the proviso of sub-para. (iii.) of para. 2. If this contention is upheld, there is no doubt that the claim is excluded, in view of the finding of the learned judge that the appellant has not been exposed to the dust of silica rock.

My Lords, I have difficulty in seeing any justification for the construction proposed by the respondents; in my opinion the meaning of the language used in the amendment is plain. The words "the processes specified in paragraph 2 of the said Scheme" clearly comprehend all the eight sub-paragraphs, and the new inclusion must be that of an additional sub-paragraph. The language used, in my opinion, does not mean, and cannot be read as meaning, that the amendment is to be included in any particular sub-paragraph. With all respect to the learned judges of the Court of Appeal, their decision appears to me to go outside the province of the Court, and to qualify and restrict the plain language used so as to substitute for the words "as if the processes specified in paragraph 2 of the said Scheme" the words "as if the processes specified in sub-paragraph (iii.) of paragraph 2 of the said Scheme."

In my opinion the learned county court judge was right when he held that, in the absence of specific direction, the amendment should not be placed in sub-para. (iii.) of para. 2.

There was some question as to whether the effect of the amendment was to render heads (*a*) and (*b*) of sub-para. (iii.) otiose, which was the view held by all the Lords Justices, or whether there might be some cases, as, for instance, of employment above ground, in regard to which these heads might still find room for operation; but it seems to me unnecessary to consider this question. If these two heads are in effect superseded, then, in my opinion, the proviso which qualifies them must disappear also; it has no independent existence: *Horsnail* v. *Bruce* (1), per Bovill C.J. If, on the other hand, there are still cases in which these two heads can be effective, the proviso will to that extent remain. In any event, the survivance of sub-para. (iii.) was still necessary for cases in which the date of the injury was prior to October 22, 1934, when the Amendment Scheme came into operation.

Counsel for the respondents also sought to maintain, by reference to the previous Scheme of 1928 and the Amendment Scheme of 1930, an argument based on the policy of the Secretary of State in making these Schemes. In face of the

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(1) L. R. 8 C. P. 378, 385.

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plain words used in the Amendment Scheme of 1934, the Court is bound to accept them as expressing his policy at that date, but I may add that these earlier Schemes merely show a cautious beginning with a progressive extension in favour of the workmen. It must be borne in mind that the Secretary of State is developing the policy prescribed by Parliament in s. 47 of the Act of 1925—the provision of payment of compensation in industries or processes involving exposure to silica dust. While I doubt if the subsequent Amendment Scheme of 1935 is relevant, it may be noted that the Amendment Scheme of 1930 shows, in its para. 2, that express provision is made when it is desired to link up a new addition with a particular sub-paragraph.

Reference was made to Lord Atkin's speech in *Morgan* v. *Amalgamated Anthracite Collieries, Ld.* (1), and in particular to his reference (2) to the Amendment Scheme of 1934; but the present question as to the proviso in sub-para. (iii.) was not raised or considered by this House in that case.

I am therefore clearly of opinion that the respective appellants are entitled to succeed. Accordingly the appeals should be allowed, the orders of the Court of Appeal should be set aside, and the orders of the county court judge should be restored, the respective appellants to have the costs of their appeals, and their costs in the Court of Appeal.

LORD RUSSELL OF KILLOWEN. My Lords, unless one starts with the preconceived idea that the Secretary of State intended to make the process described in the Various Industries (Silicosis) Amendment Scheme, 1934, subject to the proviso which is contained in sub-para. (iii.) of para. 2 of the Various Industries (Silicosis) Scheme, 1931, there is nothing to justify the insertion of that process into any particular part of para. 2. There is nothing in the wording of the Order of October 22, 1934, to justify it. According to the plain meaning of the language used, a described process is to be added to the processes specified in para. 2. Nothing more is said, by way of qualification, limitation or restriction, except only that the

(1) 28 B. W. C. C. 358.

(2) Ibid. 362.

Order applies to workmen employed in the added process at any time on or after the date of the Order.

To assign, as the Court of Appeal have done, a particular sub-paragraph of the 1931 Scheme, and indeed a particular place in that sub-paragraph as the spot at which the inclusion is to be made, is not to construe the Order of 1934, but to amend it and add to it. One hears nowadays of the executive usurping the functions of the judiciary. The decision of the Court of Appeal has all the appearance of the converse process.

The effect of the Order of 1934, if read sans phrase, would be no doubt in the course of a short time to render sub-para. (iii.) of the Scheme of 1931 a dead letter, except in so far as, if at all, it covers surface operations. Operations underground in coal mines seem thus to have been put on much the same footing as were already put operations underground in tin mines, and as are now put operations underground in hæmatite iron ore mines. This we must assume, on the language used in the Order of 1934, was the intention of the Secretary of State. There is certainly nothing in the language used which would justify us in arriving at any different conclusion.

Agreeing as I do with the opinion expressed by the noble Lord on the Woolsack, I concur in the view that these appeals should be allowed.

LORD ROCHE. My Lords, I concur.

Orders of the Court of Appeal reversed. Awards of the county court judge restored. Respondents to pay the respective appellants their costs here and in the Court of Appeal.

Lords' Journals, March 15, 1937.

Solicitors: *Corbin, Greener & Cook, for Raley & Sons, Barnsley; Johnson, Weatherall, Sturt & Hardy, for Parker, Rhodes, Cockburn & Co., Rotherham.*

[HOUSE OF LORDS.]

H. L. (E.)* ALDERMAN . . . . APPELLANT;

1937

Feb. 26; April 8.

AND

GREAT WESTERN RAILWAY COMPANY . . . . RESPONDENTS.

Workmen's compensation—Accident "arising out of and in the course of the employment"—Travelling Ticket Collector—Necessity of staying in lodgings on one journey—Fall in street in proceeding from lodgings to station—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1.

The applicant, a travelling ticket collector in the employment of the respondent railway company, had, in the course of his duty, to travel from Oxford, where his home was, to Swansea, where he had to stay overnight, returning thence on the following day to Oxford. Being also qualified as a guard and, as such, liable to be called upon in an emergency, he was required by the railway company to leave, and he in fact left with them, the address of his Swansea lodgings. Apart from this obligation he had an unfettered right as to how he spent his time at Swansea between signing off and signing on, and he could reach the station by any route or by any method he chose. In proceeding one morning from his lodgings to Swansea station to perform his usual duty, he fell in the street and sustained an injury in respect of which he claimed compensation:—

Held, that while in the street proceeding from his lodgings to the station, the applicant was not performing any duty under his contract of service; that, therefore, the accident did not arise in the course of his employment; and consequently that he was not entitled to compensation.

Observations of Lord Buckmaster in *Sparey* v. *Bath Rural District Council* (1931) 24 B. W. C. C. 414, 418, in relation to the position of a workman leaving his work, applied to a workman going to his work.

Decision of Court of Appeal [1936] 2 K. B. 90 affirmed.

APPEAL from a decision of the Court of Appeal. (1)

The applicant, a ticket collector in the service of the Great Western Railway Company, resided at Oxford, and his duty, which he had been performing for some years, required him to travel from Oxford to Paddington and from there to Swansea, where he had to stay overnight, and next morning to return to Oxford via Paddington. He had to leave the address of his Swansea lodgings with the company's officials so that they might know where to find him in case he was required for emergency duty, he being also qualified as a guard. On January 16, 1935, he made the usual journey to Swansea, and on the following morning in walking from his lodgings to the station in order to make the return journey to Oxford via Paddington he slipped in the street and broke his ankle, whereby he was incapacitated for a considerable time, and in respect of this he claimed compensation.

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(1) [1936] 2 K. B. 90.

* *Present:* LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD ROCHE.

The county court judge stated in his findings that the applicant's "right under his contract of service was, after arrival at Swansea, to choose any lodgings in reasonable proximity to his work, to exercise an unfettered right in spending his time between signing off and signing on, and to get to the scene of his work by any route or any method of locomotion he might choose to select. His obligations under the contract of service were to leave his address with his employers, not to go too far away, and to sign on at the company's premises (where his duties lay) at the scheduled hour"; that the accident in the street in going from his lodgings to the station at Swansea to resume work did not arise in the course of his employment; and therefore that he was not entitled to compensation.

On appeal, the Court of Appeal held (1) that while in his lodgings at Swansea or in the street proceeding thence to the station the applicant was not performing any duty under his contract of service; that, therefore, the accident did not arise in the course of his employment; and consequently that he was not entitled to compensation.

The applicant appealed to this House.

Lynskey K.C. and *W. Shakespeare* for the appellant. It must be borne in mind that the appellant was liable at any time to be called out on emergency duty, and on that account was required to be in lodgings not too far from the Swansea station,

(1) [1936] 2 K. B. 90.

and, further, was required to leave his address with the station authorities. To ascertain whether the accident arose out of and in the course of his employment it is necessary to ascertain what was his contract. That involved not merely travelling by train but staying away from his home every other night; his service was thus not limited to periods when he was actually at work on the trains. Of course if the accident had occurred, for example, when he was going to or coming from a cinema it would not have arisen out of and in the course of his employment: in such a case he would have been in the place where the accident occurred for his own purposes. But in this case the fact that under the contract the respondents paid him a lodging allowance in addition to the standard wage shows that in the contemplation of the parties the contract of service covered the time spent in going to and coming from his lodgings. There was thus continuous employment during his work on the train and going to and from his lodgings. *Holmes* v. *Great Northern Ry. Co.* (1) and *St. Helens Colliery Co.* v. *Hewitson* (2) support the view now contended for.

Cave K.C. and *D. C. Bartley* for the respondents. No real restriction was placed as to the lodgings which the appellant should occupy while in Swansea save that they were to be fairly near the station. The respondents had no control over him from the time he signed off; when he did so he was his own master. There is no case of a workman during the period when he is his own master being held entitled to maintain a claim for compensation. *Davidson & Co.* v. *McRobb* (3) shows what the words "arising out of and in the course of the employment" include, and there is nothing in that case to indicate that when a man has to remain away from home overnight his contract of service covers the whole period till he returns home. The present case does not differ from the ordinary one of a man meeting with an accident while going to his work. Here it was open to the appellant to proceed in any way he chose to the station. The observations in

(1) [1900] 2 Q. B. 409.
(2) [1924] A. C. 59.
(3) [1918] A. C. 304.

Stewart & Son v. *Longhurst* (1); *Sparey* v. *Bath Rural District Council* (2); and *Philbin* v. *Hayes* (3) also support our contention.

Lynskey K.C. replied.

The House took time for consideration.

1937. April 8. LORD THANKERTON. My Lords, in this appeal I have had the advantage of considering the opinion which is about to be delivered by my noble and learned friend Lord Russell of Killowen, and I desire to express my entire concurrence with it.

LORD RUSSELL OF KILLOWEN. My Lords, the appellant, James Alderman, has been in the service of the Great Western Railway Company for a number of years, during which he has been employed on what is known as "double home turn," between Oxford and Swansea via Paddington. The nature of this duty is best explained by stating exactly what he does. He signs on at the Oxford station at 10.30 A.M. He travels on a train to Paddington. From Paddington he travels on a train to Swansea, where he signs off at 6.30 P.M., having thus been on duty for eight hours. He signs on again the next morning at Swansea at 8.30 and travels on a train to Paddington, and thence on a train to Oxford where he signs off at 4.30 in the afternoon, having thus again been on duty for eight hours. On each of the four trains he acts as a travelling ticket-collector. He is also a qualified guard, but has not acted in that capacity.

During the intervals between signing off and signing on at Swansea and during the intervals between signing off and signing on at Oxford he is free to do what he wishes, to go where he wishes, and to lodge where he wishes, but he must acquaint the Oxford station with his Oxford address and the Swansea station with his Swansea address. The reason for this requirement is that in case of some emergency arising he could be called upon, if the company could get in touch with him, to do emergency duty for extra pay. This, as can be imagined, would be a rare occurrence, and in fact it has never happened to the appellant.

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(1) [1917] A. C. 249.

(2) 24 B. W. C. C. 414.

(3) (1918) 11 B. W. C. C. 85.

It was suggested that the terms of his employment fettered him in his choice of abode (whether at Oxford or Swansea) and bound him to live near the company's station. I can find no justification for this view. The evidence on the point given by the appellant was as follows: "When I book off I can go to any lodgings I like. I don't think the company like you to stay too far away . . . The company don't exercise any sort of control where we should spend the night, but we leave address so that we might be sent for." The only other evidence on this point was given by another servant doing double home turn who said: "We make our own arrangements—sleep where we like. Company make no arrangements. Entitled to sleep anywhere." It appears to me that during the intervals when the appellant was off duty at Swansea and at Oxford he was completely his own master, subject only to the possibility of an emergency call being made and finding him accessible.

The appellant's standard wage was 65*s*. a week. In addition he received a lodging allowance in respect of the extra expense occasioned to him by having to spend nights away from his home. This was calculated, in accordance with an arrangement between the company and the men's union, at 1½*d*. for every hour which elapsed between his signing on and signing off at Oxford, namely—thirty hours. His allowance in the present case would accordingly amount for the six weekdays to 11*s*. 3*d*.

Let me now state the events which have led up to the present appeal.

The appellant was at Swansea on January 16, 1935, having signed off at Swansea station that afternoon. He slept at his usual lodgings in Swansea, and left them the next morning to sign on again at the station. On the way he slipped, fell, and broke his ankle, with the result that he was incapacitated for some twenty-two weeks or so. He claimed compensation for the injury on the footing that it had been sustained by him by accident arising out of and in the course of his employment, The company denied that the accident arose in the course of the employment. That was, and is, the sole question in issue between the parties. If the accident is held to have arisen in the course of the employment, the company do not dispute that it also arose out of the employment.

Upon the hearing of the arbitration the learned county court judge made his award in favour of the company. He was of opinion that the course of the appellant's employment was interrupted when he signed off at Swansea, and that the mere fact that the accident happened while he was going to his work was not enough to establish that the accident happened in the course of the employment. An appeal from the award was dismissed by the Court of Appeal.

I have stated the facts of this case in some detail because the decision whether a particular accident to a particular workman did or did not arise in the course of his employment must necessarily be dependent on the facts of the particular case. Authorities are of little assistance except in so far as they lay down principles which are of general application.

One such principle, however, is clearly established in *Davidson & Co.* v. *McRobb* (1), namely, that the words "in the course of the employment" do not mean during the currency of the time of the engagement, but in the course of the work which a man is employed to do and what is incident to it. A man may well be in the employment of another at the time when the accident happens and yet the accident may not have arisen "in the course of" the employment. A passage from Lord Dunedin's speech in that case may appropriately be cited in which he said: "In my view 'in the course of employment' is a different thing from 'during the period of employment.' It connotes to my mind the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must I think be work or the natural incidents connected with the class of work, e.g. in the workman's case the taking of meals during the hours of labour; in the servant's not only the taking of meals, but resting and

(1) [1918] A. C. 304.

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sleeping, which follow from the fact that domestic servants generally live and sleep under the master's roof."

The appellant's case seems to have been understood by the Court of Appeal as depending upon the proposition that because the appellant's choice of lodgings at Swansea was to some extent limited by his contract he was, while walking from those lodgings to the Swansea station, doing something which he was employed to do, or at all events something necessarily incidental thereto, and that it was because he was performing a duty under his contract of service that he found himself at the spot where the accident befell him. The employment was accordingly a continuing one, and the accident therefore arose in the course of it. The Court of Appeal rejected that argument.

For myself I can see no foundation for any such contention on the facts of the present case. As I have already indicated there is no evidence of any contractual limitation at all of the man's choice of abode either at Swansea or Oxford. But even if there had been some term of the contract, which ensured that his lodging should not be unreasonably far from the Swansea station, it would still have been impossible to say that his contract of employment necessitated his presence on the spot where the accident occurred. He was there only because it lay on the route between the station and the particular house which he himself had happened to select. The case would still have failed to contain the element of fact which was the essential ground of the decision in the case of *London & North Eastern Ry. Co.* v. *Brentnall* (1), namely, the contractual obligation to go to the particular place where the accident happened.

Before your Lordships, however, another and alternative argument was presented, which was independent of any question of limitation of choice of lodging. It was said that the appellant's contract of employment compelled him to go to Swansea and return to Oxford the next day; that, therefore, he was employed to go the next day from wherever he spent the previous night to Swansea station; and that accordingly

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(1) [1933] A. C. 489.

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in being on the spot where the accident occurred he was doing something which he was employed to do, with the result that the accident arose in the course of his employment. This argument proves I think too much. Put it the other way round. It is just as true to say of him that when he signed on at Swansea his contract of employment compelled him to go to Oxford and return to Swansea the next day, and that, therefore, he was employed to go the next day from wherever he spent the previous night to Oxford station; and yet it has all along been conceded that if an accident befell him on his way to the Oxford station it would not have arisen in the course of his employment.

The truth is that this alternative argument is only the old one with this addition, that it is said that the fact that the workman's home is at Oxford and that his contract of employment takes him away from his home, makes all the difference.

My Lords, I am unable to appreciate how this can be. The cases in which men are employed to work at a distance from their homes and have to find lodgings for themselves must be innumerable. Yet there is no case in the books, or at all events none was cited, in which such an one meeting with an accident when merely on his way to or from his work has been held entitled to compensation. In order to entitle him to compensation in such a case some other element must be present (involving the discharge of a contractual duty to the employer) which in law extends the course of his employment so as to include the moment of time when the accident occurred.

The words used by Lord Buckmaster in *Sparey* v. *Bath Rural District Council* (1) in relation to a workman leaving his work, apply equally to this appellant who was going to it. "The course of employment continues," he said, "while the workman is lawfully upon the employer's premises. Hazards which he then encounters will, if they result in accident, be risks which the workman has run in the course of his employment, but when once the premises are left and the workman is no longer under any control, and is in all respects

(1) 24 B. W. C. C. 414, 418.

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and for all purposes in the same position as an ordinary member of the public enjoying the same liberty and sharing the same risks, the danger he there encounters is one which other members of the public equally share." So in the case of this appellant; when he set out from the house in which he had chosen to lodge in Swansea to go to sign on at the station he was (and had been ever since he had signed off on the previous afternoon) subject to no control and he was for all purposes in the same position as an ordinary member of the public, using the streets in transit to his employer's premises.

My Lords, in my opinion this is, upon its facts, a plain case of an employment interrupted on each signing off at Swansea and Oxford, and resumed at each signing on at Oxford and Swansea, the workman, during the intervals between every interruption and resumption, being free and his own master in all respects (except only for the very remote possibility of his being called upon to undertake a fresh emergency employment for extra pay); with the result that nothing which happened during those intervals can be said to have happened in the course of his employment.

I would dismiss this appeal with costs.

LORD ROCHE. My Lords, I concur.

Appeal dismissed.

Solicitors for appellant: *Pattinson & Brewer.*
Solicitor for respondents: *A. G. Hubbard.*

[HOUSE OF LORDS.]

H. L. (E.)*

1937

March 1, 2; April 8.

KNOWLES . . . . APPELLANT;

AND

SOUTHERN RAILWAY COMPANY . . RESPONDENTS.

Workmen's compensation—Whether accident happened in the course of the employment—Whether act done for purpose of employers' business—Rule prohibiting consumption of intoxicating liquor while on duty—Workman leaves his van for prohibited purpose—Accident in remounting van—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-ss.* 1, 2.

The respondent railway company had a rule that "employees must not consume intoxicating liquor while on duty." This rule was well known to the company's employees, including the deceased man, a carter, whose duty it was to drive a pair-horse van. On the day of the accident giving rise to the claim for compensation, while he was taking a load from one depot to another he stopped his van outside a public-house, descended from the box seat, and having put a chain on the near side wheel and removed a trace he went some distance up a side street to a public-house for the purpose of getting a glass of beer and also for the purpose of using the lavatory; but the county court judge found as a fact that the man's dominant purpose was to drink the beer. On his return to the van he removed the chain, replaced the trace, took the reins in his hands, and was in the act of mounting to his seat when, probably owing to the horses starting to move, he slipped and fell under the wheel and sustained injuries which caused his death. On a claim for compensation by his widow:—

Held, (1.) that the accident did not arise in the course of the deceased man's employment, seeing that it happened before he had completed the series of acts—unchaining the wheel, refastening the trace, taking possession of the reins—which, owing to his breach of duty, had to be performed before he could regain effective control of the horses for the purpose of re-starting them; and (2.) that the accident could not be deemed to have arisen out of and in the course of the deceased man's employment within the meaning of s. 1, sub-s. 2, of the Act, inasmuch as the act he was doing in contravention of a regulation applicable to his employment was attempting to regain his seat on the van as one part of a composite act of consuming intoxicating liquor while on duty, which act, being expressly forbidden by the terms of the employment, could not be said to be an act "done by the workman for the purposes of and in connection with his employer's trade or business" within the meaning of the sub-section.

Dictum in *Taylor* v. *Lock* (No. 1) (1930) 23 B. W. C. C. 55, 63 considered.

Decision of Court of Appeal [1936] 2 K. B. 330 affirmed.

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* *Present:* LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD ROCHE.

APPEAL from a decision of the Court of Appeal (1) allowing an appeal from an award of the judge of the Southwark County Court in favour of the widow of George Knowles, who died as a result of an accident on June 12, 1934.

Knowles was employed by the Southern Railway Company as a van driver. On the day of the accident he was sent out from the company's Tooley Street depot with a load to be taken to the Nine Elms depot. While on his way from Tooley Street he stopped his van outside a public-house in the Borough, descended from his seat, put a chain on the near side wheel, removed the near side trace and put the reins through a ring on the harness; he then went to a public-house called the "Gladstone Arms" in a side street, entered it, walked through to the lavatory, having ordered a pint of beer as he passed. After coming from the lavatory he drank the beer, left the public-house, and went back to his van, being absent between five and ten minutes.

On getting back to the van Knowles removed the chain from the wheel, replaced the trace and took the reins in his hand, and was in the act of mounting to his seat, when, probably owing to the fact that the horses started, he slipped and fell under the wheel, whereby he sustained injuries which caused his death.

The deceased man's widow claimed compensation under the Workmen's Compensation Act, 1925. (2)

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(1) [1936] 2 K. B. 330.

(2) The relevant provisions of the Workmen's Compensation Act, 1925, are as follows:—

Sect. 1, sub-s. 1: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained:

Provided that— . . . .

(b) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed."

Sub-s. 2: "For the purposes of this Act, an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or

The county court judge found that the deceased man had been guilty of a breach of one of the company's rules, of which he had notice, providing that "employees must not consume intoxicating liquor while on duty," but he held that the rule merely regulated the man's conduct in, and did not limit the scope of, his employment. He found that the man left the van for two purposes, the dominant one being to drink the beer and the other to use the lavatory. He held that at the moment of the accident when Knowles was mounting the box he had fully returned to his employment and that in mounting the box he was doing something for the purpose of his employer's trade or business. The judge therefore found for the applicant. On appeal, the Court of Appeal held that the accident did not arise out of and in the course of the employment, and that the act which caused the accident was done not for the employers' purposes but to enable the man to resume his wrongfully interrupted employment, and therefore the applicant could not avail herself of s. 1, sub-s. 2, of the Act.

The applicant appealed to this House.

Lynskey K.C. and *W. Shakespeare* for the appellant. As the man was employed not merely to drive the van but also to attend to the horses, which would involve sometimes getting down, the box seat cannot be taken as the sole place of his employment; he might therefore resume work at a different point from that at which he left it. We contend therefore that he resumed work when he returned to the van: *Warren* v. *Hedley's Colliery Co.* (1) Further, this accident must be deemed to have arisen out of and in the course of the employment, as what he was doing at the critical moment was done by him "for the purposes of and in connection with his employer's trade or business" within s. 1, sub-s. 2, of the Act. When he was in the act of getting on to the

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other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business."

(1) (1913) 6 B. W. C. C. 136.

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van he was doing something for the purposes of the company's business and was therefore not outside the sphere of the employment: *Matthews* v. *Victoria Spinning Co.* (*Rochdale*) (1), which applied *Thomas* v. *Ocean Coal Co.* (2) Further, *Low or Jackson* v. *Steam Fishing Co.* (3) points to the conclusion that this is not a question of law but a question of fact, and, therefore, is one for the county court judge, and that being so his finding ought not to be disturbed.

Cave K.C. and *F. W. Beney* for the respondents. The county court judge misapprehended the nature of the prohibition to servants in the employment of the respondents and the true import of s. 1, sub-s. 2, of the Act. The prohibition involves not only the drinking of beer or other intoxicating liquor while on duty, it involves also the going off duty to get it and coming back again to the actual place of work. Unless the deceased man had done the prohibited act he would not have incurred the risk of getting back to his seat. He would only resume his employment when he actually reached his box seat. In breaking the rule he went outside his employment altogether and therefore the subsection has no application.

Lynskey K.C. replied.

[*Everitt* v. *Eastaff & Co.* (4); *Davies* v. *Gwauncaegurwen Colliery* (5); and *Clarke* v. *Southern Railway Co.* (6) were also referred to.]

The House took time for consideration.

1937. April 8. LORD THANKERTON. My Lords, I desire to express my concurrence in the opinion which is about to be read by my noble and learned friend Lord Russell of Killowen, which I have had the opportunity of considering.

LORD RUSSELL OF KILLOWEN. My Lords, in this case one's sympathies lie naturally with the appellant, whose husband met with his death in singularly unlucky circumstances, and with their children; but we must, on this account, be all the more careful to see that no liability is cast upon the employer unless it is so cast by the Act of Parliament.

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(1) (1936) 29 B. W. C. C. 242.
(2) [1933] A. C. 100.
(3) [1909] A. C. 523.
(4) (1913) 6 B. W. C. C. 184.
(5) [1924] 2 K. B. 651.
(6) (1927) 96 L. J. (K. B.) 572.

The learned arbitrator made his award finding that the injury which resulted in the death of George Knowles was an injury by accident arising out of and in the course of the employment, and awarding compensation to the dependants. The only question in dispute is whether the accident arose out of and in the course of the employment, or is to be deemed to have so arisen. I need not state the facts which led up to the accident. They have been found by the county court judge and are not in dispute. It is sufficient to say that the appellant claims alternatively (1.) that if the course of the employment had been interrupted when the man left the driver's seat of his horse-van, the employment had been resumed before the accident occurred, and that therefore the accident in fact arose out of and in the course of the employment, or (2.) that if the accident did not arise out of and in the course of the employment, it must, by virtue of s. 1, sub-s. 2, of the Act, be deemed to have so arisen.

The Court of Appeal set aside the award and ordered that an award be entered for the employers.

Two preliminary matters must first be made clear. The first relates to the rule of the employers which provided that: "Employees must not consume intoxicating liquor while on duty." The county court judge held, treating it as a question of fact, that this rule merely regulated the conduct of the workman within the sphere of his employment and was not a rule limiting the scope or sphere of his employment. By that I understand him to mean that a man, while in the act of breaking the rule, could still be said to be doing that which he was employed to do. In my opinion the judge was wrong both in treating the question for decision as one of fact, and in the conclusion at which he arrived. I agree with the view expressed by Greene L.J.—namely, that where a man leaves his work in order to break a rule, he necessarily takes himself out of the scope or sphere of his employment, and remains outside its limits until the time (whenever that may be—and that is another question) when he resumes his employment.

The second matter is this: the county court judge has made the following finding of fact: "It may be, of course, that Knowles' dominant purpose on all the occasions when he visited the 'Gladstone' was to relieve himself, but in my view the proper inference to draw from the evidence is that the primary object of the visits to the 'Gladstone' was to get a glass of beer, and I find as a fact that that was Knowles' dominant purpose when he visited the 'Gladstone' on the evening when he met his death." Upon this finding an argument was addressed to us by the appellant's counsel, based upon the view that in quitting his van opposite one public-house in the Borough High Street, and making his way down Lant Street to another public-house more than 100 yards away, Knowles was influenced as much by a desire which involved no breach of a rule, as by the wish for liquor which did. I can find no trace of this double purpose argument in any of the judgments, either in that of the county court judge or in those of the Court of Appeal. Nor do I think that the finding of the county court judge will support it; for I do not understand him to mean anything other than this: that the stoppage in the Borough High Street and the expedition to the "Gladstone" were brought about in order to obtain a drink of beer, and that advantage was taken of the visit to the "Gladstone" for the accomplishment of the other act. If he had meant by his finding that a twofold purpose caused the stoppage, he would assuredly have said so in express terms. In fact he was by his finding answering the alternative question which he had posed earlier in his judgment—namely, "whether Knowles visited the 'Gladstone' on this occasion for the purpose of relieving himself, or for the purpose of having a glass of beer"; and in my opinion his finding means that had the workman not wished to have the glass of beer, he would not have interrupted his journey. For myself, I feel bound to deal with the case on that footing.

Taking the view which I take on these two preliminary points, I am of opinion that from the moment that the workman left the driver's seat, as the first step towards the "Gladstone," he broke off his employment; and that none of the acts which he did, such as chaining up the near hind wheel, or unfastening the near trace, or putting the reins through the harness ring, were acts done in the course of his employment. They could not be; for he himself had interrupted that course, and was doing acts the opportunity or necessity for which had only arisen from his desire to do something which his employers forbade him to do. The only question then on this part of the case would appear to be, Did the accident happen before or after he had resumed his employment? If before, then it did not arise out of and in the course of the employment; if after, then it did.

The case of *Warren* v. *Hedley's Colliery Co.* (1) was cited to us in which Lord Cozens-Hardy put as a hypothetical case, that a workman who had interrupted his employment might be entitled to compensation, if he had "practically" got back, and resumed his work. Each case must depend upon its particular facts, which must be examined and weighed before arriving at a conclusion whether or not the accident happened in the course of the employment. The use of the word "practically" leaves the door ajar, and no doubt Lord Cozens-Hardy in using it, had in mind the difficulty of laying down any specific test which would be applicable, and infallible in its application, to all conceivable facts. But undoubtedly the phrase in the authorities which most closely applies to the facts of the present case is contained in the judgment of Romer L.J. in the case of *Taylor* v. *Lock* (No. 2) (2), where he used the following language in reference to a workman who had got down from a steam-driven lorry and was killed in attempting to climb on to it again, whilst it was in motion: "Having temporarily left his employment, it was his duty to his employer to re-enter the employment as soon as possible, and, in my opinion, when he was . . . . getting up on the step to get into the steam engine again he had re-entered his employer's employment." This dictum (for it is only a dictum) must I think be based on the use by Lord Cozens-Hardy in

(1) 6 B. W. C. C. 136.
(2) 23 B. W. C. C. 55, 63.

Warren's case (1) of the word "practically." If the dictum simply means that on the facts which were proved to exist in *Taylor* v. *Lock* (No. 2) (2) the man was in the employment at the time of the accident, it would be correct; because it would appear (as pointed out by Greene L.J. in the present case) that in the view of the Court the employment had never been interrupted. As Slesser L.J. stated when the case came before the Court of Appeal a second time, the Court had on the first occasion come to the conclusion that the employment had not been interrupted. But if the dictum means that a workman who, for his own purpose, has left his work as a lorry driver, must be taken to have re-entered the employment the moment he tries to regain the driving seat of his lorry, I would not agree with it.

My Lords, I will not attempt, and I think it would be unwise to attempt, to define a point of time or place at which, and only at which, the workman in the present case could be said to have resumed his employment. Events might have happened (which did not in fact happen) which might conceivably alter either the point of time or place or both. It is sufficient to state why I think that, on the actual facts of this case, the accident happened before the interrupted employment had been resumed.

When the man returned to the van he had perforce to do several things before he could resume the work which he was employed to do. He had to unchain a wheel, refasten a trace, take possession of the reins, and regain effective control of his horses in order to start them again on their interrupted journey. The doing of these various things cannot in my opinion be properly attributed (as the county court judge has attributed them) to the discharge by the workman of his duty to his employer. They were things done in order to repair a breach of duty, the necessity for doing which had been brought about solely by the breach of duty. The accident in fact happened before the workman had completed the series of acts which, owing to his breach of duty, had to be performed before he could begin to regain effective control of his horses for the purpose of re-starting them on the interrupted journey.

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(1) 6 B. W. C. C. 136.

(2) 23 B. W. C. C. 55, 63.

The arbitrator's finding of fact that the workman had resumed his employment at the time of the accident, was based upon the view that the unchaining of the wheel and replacing of the trace were acts done in the discharge of a duty to the employer, and therefore a resumption of employment. This view is erroneous, and appears to be inconsistent with the decision of the Court of Appeal in *Everitt* v. *Eastaff & Co.* (1) In my opinion it is impossible on the facts of this case to hold that the man had resumed his employment at or before the time when the accident happened. From this it follows that the accident did not arise out of and in the course of the employment.

I would only add this. A point was urged on behalf of the appellant—namely, that, according to the evidence, on returning to his van and before unchaining the wheel, Knowles handed to the van boy the consignment notes. This fact, it was said, established a definite resumption of employment at that moment. This argument can I think only have been used in your Lordships' House. The county court judge never mentions the incident, nor do the Court of Appeal. In my opinion, however, the handing over of the consignment notes, where and when they were handed over, could not effect a resumption of the employment, any more than it would have effected such resumption had the van boy accompanied Knowles to the "Gladstone," and had the notes been handed over to him on those premises.

The appellant's claim must therefore fail, unless (as she contends) the accident is by virtue of s. 1, sub-s. 2, of the Act to be deemed to have arisen out of and in the course of the employment.

My Lords, I think the answer to this contention is short. A necessary condition for the application of the sub-section is that which is designated by the words "if such act was done by the workman for the purposes of and in connection with his employer's trade or business." The words "such act" must mean the act which is referred to in the preceding words "the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment" and the succeeding words. The only act which the workman can be said to have been doing at the time of the accident in contravention of a regulation applicable to his employment, was attempting to regain the driver's seat as one part of a composite act of consuming intoxicating liquor while on duty. This act is one which, being expressly forbidden by the terms of employment, can by no stretch of imagination or language be said to be an act "done by the workman for the purposes of and in connection with his employer's trade or business." Indeed, as Warrington L.J. pointed out in *Davies* v. *Gwauncaegurwen Colliery* (1), those words indicate an intention to prevent the section applying to acts merely incidental to the employment. In truth the facts of the present case cannot be made to fit into the requirements of the sub-section.

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(1) 6 B. W. C. C. 184.

I would dismiss this appeal.

LORD ROCHE. My Lords, I concur.

Appeal dismissed.

Solicitors for appellant: *Pattinson & Brewer.*
Solicitor for respondents: *W. Bishop.*

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(1) [1924] 2 K. B. 651, 660.

Applied. BANQUE DES MARCHANDS DE MOSCOU *v.* KINDERSLEY. [1950] 2 All E.R. 549.

Applied. LANCASHIRE WELDERS, LTD. *v.* HARLAND AND WOLFF, LTD. [1950] 2 All E.R. 1096.

Applied. BANQUE DES MARCHANDS DE MOSCOU *v.* KINDERSLEY [1951] 1 Ch. 112

Observations of LORD WRIGHT, at p. 486, *applied.* HEATH *v.* HEATH. [1950] 1 All E.R. 877.

Followed. BISHOP *v.* CUNARD WHITE STAR, LTD. [1950] 2 All E.R. 22.

Applied. HEATH *v* HEATH [1950] P. 193

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H. L. (E.)*
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April 8, 9, 30.

EVANS . . . . APPELLANT;

AND

BARTLAM . . . . RESPONDENT.

Practice—Setting aside judgment obtained by default—Discretion of judge —Jurisdiction of Court of Appeal to interfere with exercise of judge's discretion—R. S. C. Order XIII., *r.* 10; *Order* XXVII., *r.* 15.

Where a discretionary jurisdiction is given to the Court or a judge, the judge in Chambers is in no way fettered by the previous exercise of discretion by the Master, although no doubt he will give the weight it deserves to that decision.

A judgment debtor who asks for and obtains a stay of execution does not thereby approbate the judgment or elect to treat it as binding so as to preclude him from thereafter seeking to set it aside whether on appeal or otherwise.

While the Court of Appeal will not normally interfere except on grounds of law with the exercise of the judge's discretion, if it is seen that on other grounds his decision would result in injustice being done, the Court of Appeal has both the power and the duty to remedy it.

Cooper v. *Cooper* [1936] W. N. 205 approved.

Campbell & Co. v. *Pollak* [1927] A. C. 732 distinguished.

Decision of Court of Appeal [1936] 1 K. B. 202 reversed.

APPEAL by the defendant Evans from a decision of the Court of Appeal (1).

The defendant had betting transactions with, resulting in indebtedness to, the plaintiff. The latter's agent threatened to report the defendant as a defaulter if he failed to pay the losses. Thereupon the defendant, as the plaintiff alleged, promised to pay. The defendant not having paid, the plaintiff brought an action against him for the amount, but the defendant failed to enter an appearance within the stipulated time and judgment was signed against him by default. In reply to an application by the plaintiff's solicitor for payment of the amount of the judgment, the defendant asked for time so that he could make arrangements to pay, and time was given to him. Subsequently the defendant entered an appearance to the writ, applied to have the judgment set aside, and for leave to defend. The Master dismissed the application, but Greaves-Lord J. in Chambers set aside the judgment and gave leave to defend upon terms.

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROCHE.

(1) [1936] 1 K. B. 202.

On appeal to the Court of Appeal Slesser and Scott L.JJ. (Greer L.J. dissenting) came to the conclusion that the judge was precluded from exercising his discretion to set aside the judgment by the fact that with knowledge of the judgment the defendant applied for the matter to stand over for him to see if he could arrange to pay, and the plaintiff had consented to let it stand over for seven days. In Slesser L.J.'s opinion the defendant was seeking to approbate and reprobate; Scott L.J. took the view that the defendant knew or must be presumed to know that he had the right to apply to set aside the judgment, and by asking for and obtaining time he irrevocably elected to abide by the judgment.

The defendant appealed to this House.

Beyfus K.C. and *Charles L. Henderson* for the appellant. The view taken by the majority of the Court of Appeal that the doctrine of approbation and reprobation or election applied to the facts of this case has no application. Under Order XIII., r. 10, the Court is expressly given power to set aside or vary a judgment obtained by default upon such terms as may be just; see also Order XXVII., r. 15, to the like effect, and *Watt* v. *Barnett* (1). Greaves-Lord J. made an order setting aside the judgment obtained by default and giving leave to defend on terms. In doing so he exercised his discretion, which was unfettered by the view taken by the Master in Chambers, and having done so his decision cannot be interfered with. In *Campbell & Co.* v. *Pollak* (2), Viscount Cave said (3): "When a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him . . . . then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it." The principle there stated applies precisely to the present case. See also *Wright* v. *Mills* (1) and *Andromeda Handelsaktieselskab* v. *Holme*. (2) In the latter case Atkin L.J. said: "I think it is important to make it clear that nothing which is said in this decision will affect the complete discretion of the Master or a judge when asked to set aside a judgment regularly obtained to impose any just and reasonable terms upon the party so applying." With that exercise of judicial discretion the Court of Appeal should not interfere unless for very special reasons which are not present in this case.

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(1) (1878) 3 Q. B. D. 363.
(2) [1927] A. C. 732.
(3) [1927] A. C. 812.

Croom-Johnson K.C. and *Shanly* for the respondent. To entitle a litigant against whom a judgment has been regularly signed to have it set aside he must satisfy the Court of two things, first, that there is a real defence to the claim, and secondly how it is that judgment has been signed against him by default, and he must give some satisfactory explanation why he did not defend the action. A plaintiff who gets a judgment obtains thereby a right of property of which he should not be deprived unless certain conditions have been fulfilled. In *Haigh* v. *Haigh* (3) Pearson J., after citing certain passages from *Atwood* v. *Chichester* (4), said that there was no case which showed that the rule as to setting aside a judgment obtained by default could be acted upon where the party seeking to put it in force had, with full knowledge and wilfully, allowed judgment to go by default. Further, the judge in Chambers ought not to overrule the exercise of the Master's discretion, where the Master who has the powers of a judge in Chambers—see Order LIV., r. 12—has exercised his discretion on right principles.

[LORD ATKIN. Masters are not intended to be the final judges between the parties.]

[LORD ROCHE. The hearing before the judge is a rehearing.]

The judge must have some materials upon which to exercise his discretion, and we contend that there were no materials in this case upon which he could do so.

(1) (1889) 60 L. T. 887.
(2) (1923) 130 L. T. 329.
(3) (1885) 31 Ch. D. 478.
(4) (1878) 3 Q. B. D. 722.

Beyfus K.C. was not called upon to reply, but he referred to *Cooper* v. *Cooper.* (1)

1937. April 9. The House took time for consideration.

April 30. Lord Atkin. My Lords, this is an appeal by the defendant from an order of the Court of Appeal (Slesser and Scott L.JJ., Greer L.J. dissenting), who reversed an order of Greaves-Lord J., sitting in Chambers, setting aside on terms a judgment obtained against the defendant on default of appearance. The case came before the learned judge in Chambers on appeal from a Master who had refused the application. It appears that the defendant in 1931 had incurred losses to the plaintiff, a bookmaker, for bets on horse races to the amount of 1336*l.*, which by the end of 1932 had been reduced by small payments on account to 1241*l.* 11*s.* 9*d.* In May, 1935, the plaintiff, not having received any further payments, gave an authority in writing to one Irving, who carried on business as the National Turf Protection Society in the name of A. Harrison Ford, to recover the amount claimed by any steps he deemed expedient by further reporting the debtor to the Committee of Tattersalls or other authority. On May 13 Mr. Irving saw the defendant, and according to an affidavit made by Mr. Irving sworn on October 9, 1935, he told the defendant that the default would be reported to Tattersalls, and eventually agreed with him that the case would be withheld from Tattersalls so long as Mr. Irving was satisfied that the defendant would settle within a reasonable time. No further payments were made: there was a correspondence in which the defendant appeared to make it clear that he had no means to pay and that if pressed he would have to plead the Gaming Act. On July 19, 1935, the writ in the action was issued, the endorsement being for 1241*l.* 11*s.* 9*d.*, "the amount due to the plaintiff under and by virtue of an agreement made on May 13 between the Proprietor Secretary of the National Turf Protection Society acting as duly authorized agents of the plaintiff and the defendant." The writ was not served until September 16, 1935, when it was served personally ① on the defendant by Mr. Irving. The defendant says that he was then told by Mr. Irving that he had three or four weeks for appearance; Mr. Irving denies this. On September 24 the ② plaintiff's solicitors signed judgment on default of appearance and on the same day wrote to inform the defendant and asked for a cheque. Two letters followed which form the ground for the decision of the majority of the Court of Appeal. On September 26 the defendant wrote to the plaintiff's solicitor: "I am in receipt of yours of the 24th and note contents. I have seen Mr. Bartlam to-day and explained my position and he is willing for the matter to stand over so that I can see if I can make any arrangement to pay. I have never refused to pay him but have not had any income to do it with owing to bad trade. He is writing to Mr. Ford to-night. At the moment I have nothing and no assets and know he does not want to lose his money. P.S.—Kindly hold over for me and oblige." The solicitor's answer was on September 28, 1935: "I am in receipt of your letter of the 26th inst. I have also received a letter from my client who states that he wishes me to do whatever may be necessary to obtain satisfaction of the judgment obtained against you. You will readily appreciate that you have brought the present position upon yourself. You have made numerous promises both to my client and to his agent Mr. Harrison Ford as to the settlement of the amount due. No one of such promises has been performed by you and my client was left without option but to proceed as he did. In all the circumstances I ③ am prepared to let the matter stand over for a further period of seven days, but I must ask you to understand please that, unless at the expiration of that period I receive payment of the total amount due, proceedings will be taken to enforce the judgment without further notice to you." On October 3, 1935, the defendant took out a summons to set aside the default judgment and supported it by an affidavit in which he made the statement above mentioned as to having been told by Mr. Irving that he need not take any steps for a month, and stated that the alleged contract, if made at

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(1) [1936] W. N. 205.

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all, which was denied, was a contract by way of gaming and wagering. The Master dismissed the application; the learned judge on appeal granted it and set aside the judgment on terms as to costs. The power to set aside a judgment obtained on default of appearance is given to the Court or a judge under Order XIII., r. 10; and a similar power extending to judgments by default under any rule is given by Order XXVII., r. 15. It is a power entrusted to the discretion of the Court or judge, and by Order LIV., r. 12, the Master is given jurisdiction to exercise the discretion.

As to the limits of the discretion, if any, it may be necessary to say a word or two later. I only stay to mention a contention of the respondent that the Master having exercised his discretion the judge in Chambers should not reverse him unless it was made evident that the Master has exercised his discretion on wrong principles. ③ I wish to state my conviction that where there is a discretionary jurisdiction given to the Court or a judge the judge in Chambers is in no way fettered by the previous exercise of the Master's discretion. His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master: but he is in no way bound by it. This in my experience has always been the practice in Chambers, and I am glad to find it confirmed by the recent decision of the Court of Appeal in *Cooper* v. *Cooper* (1), with which I entirely agree.

On appeal to the Court of Appeal by special leave the majority, Slesser and Scott L.JJ., came to the conclusion that the judge was precluded from exercising his discretion to set aside the judgment by the fact that with knowledge of the judgment the defendant had applied for the matter to ⑥ stand over for him to see if he could arrange to pay and the plaintiff had consented to let it stand over for seven days. Slesser L.J. preferred to put it on the ground that the defendant was seeking to approbate and reprobate. He took a benefit under the judgment, namely, seven days' time, and could

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(1) [1936] W. N. 205.

⑥

not thereafter be allowed to seek to set it aside. Scott L.J. preferred to put it on election. The defendant knew or must be presumed to know that he had the right to apply to set the judgment aside and by asking for and obtaining time he irrevocably elected to abide by the judgment.

My Lords, I do not find myself convinced by these judgments. I find nothing in the facts analogous to cases where a party having obtained and enjoyed material benefit from a judgment has been held precluded from attacking it while he still is in enjoyment of the benefit. I cannot bring myself to think that a judgment debtor who asks for and receives a stay of execution approbates the judgment, so as to preclude him thereafter from seeking to set it aside whether by appeal or otherwise. Nor do I find it possible to apply the doctrine of election. It is a simple answer to say that to infer election it must be shown that the person concerned had full knowledge of the various rights amongst which he elects. There is here no evidence that the defendant at the time he asked for and received time had any knowledge of his right to apply to set the judgment aside. I cannot think that there is any presumption that he knew of this remedy either sufficiently for the purposes of the doctrine as to election or at all. For my part I am not prepared to accept the view that there is in law any presumption that any one, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application. Neither of the Lords Justices expressed any intention to review the discretion exercised by the judge in Chambers except by reference to the point which in their opinion in law precluded him from exercising any discretion in favour of the defendant. Coming to the conclusion that this point of law is ill-founded, I think it follows that the appeal to the Court of Appeal should have been dismissed. I find myself in agreement with the reasoning of Greer L.J. except on one point. I agree that both rules, Order XIII., r. 10, and Order XXVII., r. 15, give a discretionary power to the judge in

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Chambers to set aside a default judgment. The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court
⑨ evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its
⑫ discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is
⑪ to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

But in any case in my opinion the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not in my opinion exist. But while the judge has such a discretion as I have mentioned I conceive it to be a mistake to hold, as Greer L.J. seems to do, that the jurisdiction of the Court of Appeal on appeal from such an order is limited so that, as the Lord Justice
(P) said, the Court of Appeal "have no power to interfere with his exercise of discretion unless we think that he acted upon some wrong principle of law." Appellate jurisdiction is always statutory: there is in the statute no restriction upon the jurisdiction of the Court of Appeal: and while the appellate Court in the exercise of its appellate power is no

doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it. The decision in *Campbell & Co.* v. *Pollak* (1) was based upon the fact that an appeal in the matter of costs was expressly excluded from the jurisdiction of the Court of Appeal by the Act and rules.

It follows from what I have said that in this case there was no reason for interfering with the discretion of Greaves-Lord J. The appeal should be allowed and the order of the Court of Appeal set aside and the order of Greaves-Lord J. dated October 18, 1935, restored. The appellant should have the costs here and in the Court of Appeal.

LORD THANKERTON. My Lords, I concur.

LORD RUSSELL OF KILLOWEN. My Lords, Order XIII., r. 10, in its terms is unfettered by any conditions, and purports to confer upon the Court or a judge full power to set aside a judgment signed in default of appearance, and if thought fit to impose such terms, as a condition of the setting aside, as may be just.

It was argued by counsel for the respondent that before the Court or a judge could exercise the power conferred by this rule, the applicant was bound to prove (*a*) that he had some serious defence to the action and (*b*) that he had some satisfactory explanation for his failure to enter an appearance to the writ. It was said that until those two matters had been proved the door was closed to the judicial discretion; in other words, that the proof of those two matters was a condition precedent to the existence or (what amounts to the same thing) to the exercise of the judicial discretion.

For myself I can find no justification for this view in any of the authorities which were cited in argument; nor, if such authority existed, could it be easily justified in face of the wording of the rule. It would be adding a limitation which the rule does not impose.

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(1) [1927] A. C. 732.

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The contention no doubt contains this element of truth, that from the nature of the case no judge could, in exercising the discretion conferred on him by the rule, fail to consider both (*a*) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action, and (*b*) how it came about that the applicant found himself bound by a judgment regularly obtained, to which he could have set up some serious defence. But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance.

In the case now under discussion the judge in Chambers thought it proper, in the exercise of his discretion, to set aside the judgment ; and unless an appellate Court is satisfied that the discretion has been wrongly exercised and should have been exercised in the contrary way, the judge's order should be affirmed. The Court of Appeal (by a majority) has set aside the judge's order not upon the ground of a wrong exercise of the discretion, but upon the ground that, on the facts of the case, the judge was unable to exercise any discretion at all, the defendant being in some way debarred from seeking relief.

Slesser and Scott L.JJ. held that because the defendant against whom judgment had been signed had asked for and obtained a promise that the judgment would not be immediately enforced, but that the matter would be allowed to stand over for seven days, he was no longer entitled to apply to have the judgment set aside. They put it on three grounds. That he had elected not to apply to have the judgment set aside. That he could not both approbate and reprobate, and could not accordingly accept the judgment as binding and thereafter seek to set it aside. That his application for delay was a representation that he accepted the judgment which estopped him from applying to set it aside.

My Lords, I confess to a feeling of some bewilderment at the theory that a man (who so long as it stands must perforce acknowledge and bow to a judgment of the Court regularly obtained) by seeking and obtaining a temporary suspension of its execution thereby binds himself never to dispute its validity or its correctness, and never to seek to have it set aside or reversed. If this were right, no defeated litigant could safely ask his adversary for a stay of execution pending an appeal; for the grant of the request would end the right of appeal. The doctrine of election only applies to a man who elects with full knowledge of the facts. There is no suggestion that the defendant knew that he could apply to set the judgment aside. The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct; as where a man having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit. To obtain a stay of execution of a judgment is not the acceptance of any benefit conferred by the judgment. The doctrine of estoppel requires the statement of a fact, upon the faith of the truth of which another alters his position. To ask for a stay of execution is no statement of any fact. Even if it could be said (which it could not) to amount to a statement that no application would be made to set the judgment aside, that would only be a statement of intention and could ground no estoppel.

There being no justification for the grounds upon which the majority of the Court of Appeal proceeded in setting aside the judge's order, the question remains whether any reason exists for holding that the judge exercised his discretion otherwise than rightly. For myself I can find no such reason. Indeed, I would go further and say that having read and considered the evidence and letters in the case (and there is here no question of seeing witnesses and hearing them cross-examined) I would myself have come to the same conclusion as that which was reached by the learned judge.

I would accordingly allow this appeal.

LORD WRIGHT. My Lords, the Court of Appeal by a majority (Greer L.J. dissenting) have reversed an order of

Greaves-Lord J. setting aside a judgment in default given against the appellant in favour of the respondents. The Master had, in the exercise of his discretion under Order XXVII., r. 15, or Order XIII., r. 10, refused to set aside the judgment. But it is clear that where the Court of Appeal is required to review a discretionary order of a judge reversing the Master the substantial discretion is that of the judge, and it is the judge's order which must particularly be considered by the appellate Court: *Cooper* v. *Cooper*. (1) The Masters admirably exercise their discretion in routine matters of pleading, discovery, interrogatories, venue, mode of trial, and other interlocutory directions, without any appeal being necessary. But such matters may on occasion raise questions most vital to the final issue of the case. The decision of such questions is properly for the judge who will no doubt consider carefully the order of the Master. If a further appeal is taken to the Court of Appeal it is the judge's discretion which that Court has either to support or vary or reverse.

In the Court of Appeal in the present case Slesser and Scott L.JJ., who formed the majority, held that the judge's order should be reversed and leave to set aside the default judgment refused on the ground that the appellant had by his conduct shut himself out of any right to claim to have the judgment set aside. What was relied upon was that he had requested the respondents to give him time so as to see if he could make any arrangement to pay, and that the respondent had granted that request by agreeing to let the matter stand over for seven days. Slesser and Scott L.JJ. held that thereby the appellant was estopped from contesting the validity of the judgment, or must be deemed to have elected not to do so, since otherwise he would be both approbating and reprobating the judgment. It was said that he had " obtained this advantage on the basis that he did not dispute the validity of the judgment." I am not clear on what legal principle this conclusion is based. Estoppel seems to me to be out of the question since estoppel is a rule of evidence which prevents the person estopped from denying the existence of a fact; but

(1) [1936] W. N. 205.

what is postulated here is that the appellant has barred himself from exercising a legal right to apply to the Court. Election is a question of fact. I can find no facts here to show that the elements of election such as intention or knowledge of his legal rights were present. Nor can I find any evidence to justify the inference that the appellant had undertaken not to dispute the validity of the judgment. Such an undertaking, if given for sufficient consideration, so as to bind the appellant, might have supported the conclusion of the Court of Appeal; nothing less would have sufficed, though even then it would, I incline to think, still be only a matter to be considered in the exercise by the Court of its statutory discretion. But from the bare evidence that the appellant had requested and been granted a few days' time I find it impossible to draw the inference necessary to justify the conclusion. The cases cited by Slesser L.J. seem to me to deal with different circumstances. The appellant here has not taken anything under the judgment, nor has he deluded the respondents to their disadvantage. A judgment creditor may be well advised in his own interests to give a gratuitous delay to his debtor in the hope that to avoid publicity or other reasons the debtor will not seek to impeach the judgment. There was no more than that in the present case. It may be regarded as being analogous to asking for a stay of execution.

I cannot, with all respect, agree with Slesser and Scott L.JJ. in their conclusion that the appellant was barred from applying under Order XXVII., r. 15. On this footing the order of Greaves-Lord J. has been attacked on behalf of the respondents as not being a good exercise of his discretion under the rule; on the other hand Greer L.J., who dissented from the other members of the Court, took the view that the Court ought not to interfere with the order of the judge made in the exercise of his discretion. He said: "I take the decision in *Campbell* v. *Pollak* (1) in the House of Lords as meaning that wherever the judge in Chambers is invested with a discretion the Court of Appeal has no power to set aside an order made by him in the exercise of his discretion unless the Court comes to the conclusion that he exercised his discretion on grounds which were wholly irrelevant to the matters which he had to consider."

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(1) [1927] A. C. 732.

If that were so, it would be unnecessary to consider the contention of Mr. Croom-Johnson that the judge wrongly exercised his discretion. But with all deference to the learned Lord Justice, I am unable to accept what he said as a correct statement of the law or practice in this matter. *Campbell & Co.* v. *Pollak* (1) is no authority for that proposition. If it were it would have changed the law and the practice. But in truth it did not. It is dealing merely with the judge's discretion in regard to costs, which is a statutory discretion, precisely defined by statutes and statutory rules. Thus Lord Cave L.C. says (2): " The jurisdiction of the Court of Appeal to review an order of the trial Court as to costs depends on statutes and on rules of Court which have the force of a statute." I need not discuss in detail the examination by the House of that precisely limited right of review. But there is in that case no reference to or discussion of the duty or power of the Court of Appeal to review the general discretion of a judge in interlocutory matters, the extent of which has been illustrated by numerous cases before and since *Pollak's* case (1). It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination

(1) [1927] A. C. 732.

(2) Ibid. 804.

by the Court of Appeal. Thus in *Gardner* v. *Jay* (1), Bowen L.J. in discussing the discretion of the judge as regards mode of trial says: "That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed." Bowen L.J. in that case held that the appellant had not satisfied the onus of showing that the discretion of the judge had been wrongly exercised. But there are many cases in the books where it has been held that the appellant has satisfied the onus of showing that the exercise of the discretion by the judge was not justified on the facts. A judge's order fixing the date of trial or refusing to grant an adjournment is a typical exercise of purely discretionary powers, and would be interfered with by the Court of Appeal only in exceptional cases, yet it may be reviewed by the Court of Appeal. Thus in *Maxwell* v. *Keun* (2) the Court of Appeal reversed the trial judge's order refusing to the plaintiff an adjournment. That was a pure matter of discretion on the facts. Atkin L.J. said (3): "I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so." The reporter adds a note that the plaintiff succeeded in the action when it came on at the adjourned date. A recent case in which the Court of Appeal set aside a judge's order remitting an action in tort to the County Court was *Stevens* v. *Walker* (4), where it was held that the circumstances did not justify the order. I need not multiply authorities save to observe that in *Watt* v. *Barnett* (5), to which I shall refer later, the Court of Appeal, affirming the Divisional Court,

(1) (1885) 29 Ch. D. 50, 58.
(2) [1928] 1 K. B. 645.
(3) Ibid. 653.
(4) [1936] 2 K. B. 215.
(5) 3 Q. B. D. 363.

reversed the order of the judge who had refused to set aside a default judgment. There is at least one other case reported where this was done by an appellate Court.

In my opinion this House must consider, on all the circumstances of the case, the contentions on behalf of the respondent that the order of Greaves-Lord J. was wrong, and that on the merits the default judgment should not be set aside. For the reasons set out above this House has no guidance in the matter from the Court of Appeal and must determine whether the respondent has satisfied the onus of showing that the judge was wrong on the merits just as the Court of Appeal should have done.

I see no reason to interfere with the judge's order. The respondent's counsel in my judgment has entirely failed to satisfy the onus of showing that the judge was wrong. Order XXVII., r. 15, gives a discretion untrammelled in terms: it does not even require an affidavit as a condition and the discretion may be exercised on any proper material, though in practice an affidavit is generally required. To quote again from Bowen L.J. in *Gardner* v. *Jay* (1): "When a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the Judge why should the Court do so?" Similarly it has been held by the Court of Appeal in *Hope* v. *Great Western Ry. Co.* (2) that the discretion to grant or refuse a jury in King's Bench cases is in truth, as it is in terms, unfettered. It is, however, often convenient in practice to lay down, not rules of law, but some general indications, to help the Court in exercising the discretion, though in matters of discretion no one case can be an authority for another. As Kay L.J. said in *Jenkins* v. *Bushby* (3), "the Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion." A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows ex debito justitiae once the facts are ascertained. In a case like the present there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. This point was emphasized in *Watt* v. *Barnett* (1). Here the appellant shows merits, in that the debt was primarily a gaming debt; he denies that he made any new contract within *Hyams* v. *Stuart King* (2), an authority which has not yet been considered by this House. He clearly shows an issue which the Court should try. He has been guilty of no laches in making the application to set aside the default judgment, though as *Atwood* v. *Chichester* (3) and other cases show, the Court, while considering delay, have been lenient in excluding applicants on that ground. The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose. The appellant here has an explanation, the truth of which is indeed denied by the respondent, but at this stage I see no reason why he should be disbelieved on what appears to me to be a mere conflict on affidavits. For all these reasons no ground is shown to justify interference with the judge's discretion and I think that the appeal should be allowed and that this House should make the order which the Court of Appeal should have made.

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(1) 29 Ch. D. 50, 58.

(2) [1937] 2 K. B. 130.

(3) [1891] 1 Ch. 484, 495.

LORD ROCHE. My Lords, I agree that this appeal should be

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(1) 3 Q. B. D. 363.

(2) [1908] 2 K. B. 696.

(3) 3 Q. B. D. 722.

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allowed, and I have nothing to add to the reasons for that conclusion which have been stated by your Lordships.

Appeal allowed.

Solicitors for appellant: *Maude & Tunnicliffe, for Stirk & Co., Wolverhampton.*

Solicitor for respondent: *Leslie Marrison.*

[HOUSE OF LORDS.]

KIRK . . . . APPELLANT ; H. L. (E.)*

AND 1937 May 4.

EUSTACE . . . . RESPONDENT.

Husband and wife—Separation deed—Covenant by husband to pay weekly sum to wife " during her life "—Death of husband—Whether liability under covenant determined—" Contrary intention "—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 80.

By a deed made in 1922 providing for a separation between husband and wife, and containing mutual covenants to live separate and apart, the husband covenanted with his wife to pay her the weekly sum of 2*l.* during her life for her maintenance and support, but determinable upon reconciliation.

In 1936 the husband died. The widow claimed that his estate was liable to continue paying the maintenance during the rest of her life, but the executors contended that the liability had come to an end by the husband's death:—

Held, that as the deed provided that the weekly payment to the wife should continue during her life and as there was nothing in the language used to show an intention that the husband's obligation should continue only during his life, his estate remained liable to pay the weekly sum to the widow.

Decision of Court of Appeal [1937] 1 K. B. 278 reversed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of the deputy judge of the County Court of Kingston-upon-Hull.

By a deed dated September 23, 1922, made between Thomas Levitt Kirk and Annie Mary Kirk, his wife, after reciting that unhappy differences had arisen between the parties, that they had mutually agreed to live apart for the future, and that the husband had agreed to pay his wife a clear weekly sum of 2*l.* during her life for the maintenance and support of herself subject nevertheless to the provisos and conditions therein contained, it was witnessed that in pursuance of the agreement and in consideration of the premises the husband thereby covenanted with the wife (*a*) that she might at all times thereafter live apart from him; (*b*) that he would not annoy, molest, disturb or otherwise interfere with her or her manner of living, nor thereafter require her by action or otherwise endeavour to compel her to cohabit with him, or to enforce any restitution of conjugal rights, but that she might live as if she were unmarried; and (*c*) that he would during her life, on condition that and so long as she should continue to lead a chaste life, pay or cause to be paid to her the clear weekly sum of 2*l.* without any deduction whatsoever for her separate use and benefit and for her maintenance, the first payment to be made on the execution of the deed.

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(1) [1937] 1 K. B. 278.

* *Present :* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROCHE.

In consideration of the premises the wife covenanted with the husband (*a*) that she would at all times keep him indemnified against all debts and liabilities which she might thereafter contract, and from all actions, claims and demands on account thereof, and against all such costs, charges, losses, damages and expenses as might be incurred by him on account thereof; (*b*) that neither she nor any person on her behalf should molest, annoy, disturb or interfere with him, or seek to compel him to cohabit with her or endeavour to enforce restitution of conjugal rights or compel him to allow her any alimony or maintenance further than the weekly sum of 2*l.*; (*c*) that in case he should be called on to pay and actually pay any debt contracted by her, it should be lawful for him to retain out of the weekly sum of 2*l.* the amount of such debt together with any costs, etc., he might incur on account thereof.

It was further agreed that in case the parties should at any time thereafter with their mutual consent cohabit as man and wife, the weekly sum of 2*l.* should no longer be payable and all the covenants of the deed should become void.

There was no reconciliation between the parties and the husband regularly paid the 2*l.* weekly to the wife until February 16, 1936, when he died, having by his will appointed the defendants his executors. Mrs. Kirk then claimed from them the weekly sum of 2*l.* as being still payable to her, and on their refusal to pay sued them for arrears in the county court. The deputy judge gave judgment in her favour, holding that the husband's estate was liable under his covenant by virtue of s. 80 of the Law of Property Act, 1925. (1)

On appeal the Court of Appeal (Slesser and Scott L.JJ., Eve J. dissenting) held that the contract, being an agreement for separation, was based on the assumption that both parties should be living at any time when it was sought to enforce it, that on the death of the husband the whole substratum of the contract was gone, and therefore that all liability under the husband's covenant had come to an end.

The plaintiff appealed to this House.

Richard Elwes (*R. O. Wilberforce* with him) for the appellant. The view taken by the majority of the Court of Appeal that the obligation to pay the weekly sum of 2*l.* was frustrated by the death of the husband was wrong. The obligation undertaken by the husband was to pay that sum to the wife during her life, and there being no contrary intention expressed in the deed, it follows by virtue of s. 80 of the Law of Property Act, 1925, that it is binding on the husband's estate. In the precedent of a separation deed given in the Encyclopædia of Forms and Precedents (2nd ed.), vol. 2, pp. 234, et seq, the draftsman has made specific provision for the case where the payment to the wife is not to continue after the husband's death. [He was stopped.]

Willoughby Jardine K.C. and *Clive W. Salter* for the respondents. The decision of the Court of Appeal was right. The deed under consideration is a separation deed simply, and not a post-nuptial settlement: *Nicol* v. *Nicol.* (2) It contains an express term that the parties shall live apart, that is, during their joint lives, and on the death of the husband the obligation automatically ceased: *In re Gilling. Procter* v. *Watkins.* (1) On the death of the husband the whole substratum of the deed was gone. Further, this deed was entered into in substitution for and to avoid the publicity of proceedings for alimony. If an order had been made in those proceedings it would have been operative only during the joint lives of husband and wife. The deed accordingly ought to be construed in the same way.

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(1) Law of Property Act, 1925, s. 80: "(1.) A covenant and a bond and an obligation or contract under seal made after the thirty-first day of December, eighteen hundred and eighty-one, binds the real estate as well as the personal estate of the person making the same if and so far as a contrary intention is not expressed in the covenant, bond, obligation, or contract."

(2) (1886) 31 Ch. D. 524.

[*Hyman* v. *Hyman* (2) and *May* v. *May* (3) were also referred to.]

No reply was called for.

LORD ATKIN. My Lords, this is an appeal from an order of the Court of Appeal which reversed the judgment of the deputy county court judge in an action which was brought by the appellant in the county court at Hull, to recover a sum of money alleged to be due to her under a deed of separation which was made between her and her husband in 1922. The action was against the husband's executors, and it was brought in respect of two sums of money, 8*l.* which had fallen due before the death of the husband, and 12*l.* which had fallen due after his death. The only question which arises in this case is whether or not the widow is entitled to recover any sum of money which fell due after her husband died, it being said by the respondents that the provisions in the separation deed ceased to be of any effect on the husband's death.

My Lords, it is necessary to refer to the separation deed, which is in a very common form. It was made on September 23, 1922, between the husband, who was a butcher, and his wife. It recited that unhappy differences had arisen between Thomas Levitt Kirk and Annie Mary Kirk and that they had mutually agreed to live apart from each other for the future, and that Thomas Kirk had agreed to pay to Annie Kirk, his wife, "a clear weekly sum of two Pounds during her life for the maintenance and support of herself subject nevertheless to the provisos and conditions hereinafter contained." Then it proceeded: "In pursuance of the said agreement and in consideration of the premises the said Thomas Levitt Kirk hereby covenants with the said Annie Mary Kirk," and the first covenant was that Annie Kirk might at all times live apart from Thomas Kirk; the second was that Thomas Kirk should not in any manner molest the wife, which is a common form covenant; and thirdly "that the said Thomas Levitt Kirk will weekly during the life of the said Annie Mary Kirk on condition that and so long as the said Annie Mary Kirk shall continue to lead a chaste life pay or cause to be paid to the said Annie Mary Kirk or to such person or persons as she shall from time to time direct or appoint in writing the clear weekly sum of two pounds without any deduction whatsoever for the separate use and benefit of the said Annie Mary Kirk and for the maintenance of herself, the first payment thereof to be made on the execution of these presents." The deed then contained covenants by the wife: "In consideration of the premises the said Annie Mary Kirk hereby covenants with the said Thomas Levitt Kirk as follows": firstly, "that she will at all times hereafter keep the said Thomas Levitt Kirk indemnified against all debts and liabilities which the said Annie Mary Kirk may hereafter contract"; secondly, that she would not molest him; and, thirdly, that if he were at any time called upon to pay any debts which she might thereafter contract, then the amounts which he had to pay should be deducted from the amount of the weekly sum of *2l.* There was then this further provision: "It is hereby agreed that in case the said Thomas Levitt Kirk and Annie Mary Kirk shall at any time hereafter with their mutual consent cohabit as man and wife then and in such case the said weekly sum of two pounds shall be no longer payable and all the covenants hereinbefore contained shall become void."

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(1) (1905) 74 L. J. (Ch.) 335.

(2) [1929] P. 1.

(3) [1929] 2 K. B. 386.

My Lords, on the plain construction of that agreement no question, it appears to me, could arise, but that the husband's estate remained liable to pay this sum which he had covenanted to pay to the wife during her life. The wife is alive, and therefore she would, one would have thought, have become entitled under the covenant to receive that sum of money. It has to be remembered that while it is true that the covenant was not expressly made by the covenantor for his executors and administrators, by the provisions of s. 80 of the Law of Property Act, 1925, which only restated in different words the terms of the well-known section in the Conveyancing Act, 1881: " A covenant and a bond and an obligation or contract under seal made after the thirty-first day of December, eighteen hundred and eighty-one, binds the real estate as well as the personal estate of the person making the same if and so far as a contrary intention is not expressed in the covenant, bond, obligation, or contract." Therefore, this contract, which is under seal, is to be read as if it were made by the husband for his executors and administrators, unless a contrary intention is found expressed in the covenant. So far the matter seems to me to be beyond question, and the wife has the right expressed in the deed. From the judgment given by the late Mr. Owen, sitting as deputy county court judge—the judgment of a very careful, learned and experienced lawyer—he apparently had no doubt upon the matter, and he gave reasons which appear to me to be convincing for holding that the plaintiff was entitled to recover. On appeal, the majority of the Court of Appeal took a different view; Slesser and Scott L.JJ., differed from Eve J., the majority taking the view that in this particular deed a contrary intention was expressed as to the covenant binding the estate of the testator, or, in other words, continuing after his death. The view that was taken was that in a deed of this kind (I am now paraphrasing the grounds of the judgment, but I think I am expressing them accurately) the main object was to provide for the parties living apart; on the death of the husband they could no longer live apart—I think that is true—and inasmuch as they could no longer live apart, the whole basis of the contract had disappeared, and thereupon all the agreements came to an end.

My Lords, I find myself quite unable to accept that view.

It has already been held that a covenant to pay for life, expressed in a separation deed, does not come to an end after the marriage tie has ceased to exist; in other words, it does not come to an end on the divorce of the parties. For my part I see no reason at all to assume that the parties would not have made this agreement, and did not intend to make this agreement, in the events which have happened. It is a mistake to assume that because the parties enter into a contract, the primary object of which is to secure that each shall continue to render services or forbearances to the other, for a term of years, one of the promisors may not validly make a promise to continue to make a payment to the promisee after the period during which the mutual services or forbearances are to be rendered has come to an end. That seems to me to be this case: the parties have agreed to live separate, they have lived separate, the agreement has been performed so far as it can be performed up to the present, and there is no longer any obligation which could be said to be in force, or could be enforced by either party, to live apart. But what has that to do with the covenant by the husband that, provided his wife does agree to live apart from him, he will after his death continue to provide for her maintenance—the most ordinary obligation for him to assume on the one part, the most ordinary obligation for the wife to stipulate for on her part; because, if it were otherwise, she would be left on his death without any provision for her maintenance, and obviously she is not in a position to expect to receive any relief from any of his testamentary dispositions?

My Lords, with great respect for the learned Lords Justices, I fail to see any ground for invoking either the principle of frustration or any implied term which should make this stipulation on the part of the husband come to an end upon his death. As I have said, the statute quite plainly imposes an obligation which binds his estate unless a contrary intention is expressed. I find no contrary intention expressed in the deed. If I had to consider the intention of the parties at all I should have come to the conclusion that their intention was that the obligation was to last after the death of the husband; but it is unnecessary to decide that. On the plain words of the deed it appears to me that the wife proves her case; and with great respect I prefer the reasons given in the judgment of the learned deputy county court judge, and the very short and clear judgment of Eve J. In consequence I move your Lordships that this appeal should be allowed and that the judgment of the deputy county court judge should be restored.

LORD THANKERTON. My Lords, I agree. I adopt the words of Eve J. with regard to this deed when he says that "its language is clear, simple, unambiguous and intelligible. No one can read it without appreciating that the payment of 2*l.* is to continue during the lifetime of the wife. It is so stated in the recital, in clause (*c*) of the husband's covenant and in the wife's covenant." I know that sometimes the word "frustration" is regarded in legal circles as blessed equally with the word "Mesopotamia," but I confess that I cannot see any justification for suggesting its applicability in the present circumstances. I really have nothing to add to what my noble and learned friend on the Woolsack has said; I agree with him.

LORD RUSSELL OF KILLOWEN. My Lords, this appears to me to be a very plain case and one in which I would be quite satisfied to rest my decision on the grounds stated in the judgments of the deputy county court judge and of Eve J. The covenant is a covenant by the husband to pay during the life of the wife, and I cannot find that any intention is expressed in the covenant not to bind the real and personal estate of the husband. Mere implication of such an intention, even if any grounds for such an implication existed in the present case (and in my opinion no such grounds exist), would be insufficient. To speak of frustration in regard to a contract which has been carried out to completion in every detail, except the one matter here in dispute, appears to me to be a misuse of that word. I agree that the appeal should be allowed.

LORD WRIGHT. My Lords, I agree also, and I have nothing to add.

LORD ROCHE. My Lords, I agree, and have nothing to add to that which has fallen from your Lordships.

Appeal allowed.

Solicitors for appellant: *A. E. Hamlin, Brown & Co., for Pearlman and Rosen, Hull.*

Solicitors for respondents: *F. Eustace & Co., London and Hull.*

Considered. BONYTHON *v.* COMMONWEALTH OF AUSTRALIA [1951] A. C. 201

[HOUSE OF LORDS.]

H. L. (E.)*
1936
C. A.
Nov. 2.
H. L.
1937
Jan. 18, 19, 21, 22, 28;
March 15.

THE KING . . . . APPELLANT;

AND

INTERNATIONAL TRUSTEE FOR THE PROTECTION OF BONDHOLDERS AKTIENGESELLSCHAFT . . . . RESPONDENTS.

Contract—Bond—Issue by British Government in United States—Gold clause—Discharge of obligations in gold coin in United States declared by Congress to be against public policy—Depreciation of dollar—Payment under bond.

In 1917 the British Government made an offer in New York of 5½ per cent. secured loan convertible gold Notes, the principal and interest of which and of the bonds into which they might be converted were to be payable, without deduction for British taxes, in New York in United States gold coin, or, at the option of the holder, in London, in sterling at the fixed rate of 4·86½ dollars to the pound. The offer was made "subject to the approval by our counsel of necessary formalities."

The respondents were the holders of a bond, in exchange for a Note, by which the British Government promised to pay one thousand dollars on February 1, 1937, either in New York, at the office or agency to be maintained there by them, in gold coin of the United States of the standard of weight and fineness existing in February, 1917, or in London in sterling money at the fixed rate of 4·86½ dollars to the pound. The payment was to be made without deduction for any British taxes.

In 1933 by a Joint Resolution of the Congress of the United States, which it was admitted had the force of law, it was provided that every provision contained in any obligation which purported to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, was against public policy, and that any such obligation should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment was legal tender for public or private debts.

On a petition of right by the respondents claiming that they were entitled to be paid such a sum in dollars as would equal in value the number of dollars of the standard specified in the bond—namely, of the weight and fineness which was prescribed by the law of the United States existing in February, 1917:—

Held, (1.) that a consideration of all the circumstances relating to the offer of the loan—the fact that the Notes were issued in the first instance in the United States, were expressed to be in terms of United States currency, and were to be paid on one option in New York on a value estimated by reference to United States coins—pointed to the law of the United States being the proper law of the contract; and (2.) that the Joint Resolution of Congress had the statutory effect of requiring the bond to be discharged upon payment of dollar for dollar of the nominal amount.

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* *Present:* LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD MAUGHAM, and LORD ROCHE.

Dictum of Lord Romilly M.R. in *Smith* v. *Weguelin* (1869) L. R. 8 Eq. 198, to the effect that where the Government of a State contracts a loan in another country the contract is governed by the law of the State contracting the loan, and not by the law of the country in which the loan is contracted, not followed.

Decision of Court of Appeal reversed.

APPEAL from an order of the Court of Appeal (1) reversing a decision of Branson J. on a petition of right by the present respondents.

In 1917 the Government of the United Kingdom of Great Britain and Ireland made an offer in New York of 5½ per cent. secured loan convertible gold Notes on certain terms which are set out in detail in the judgment of Lord Atkin. The principal and interest of the Notes and of the bonds into which they might be converted were to be payable, without deduction for British taxes, in New York in United States gold coin, or, at the option of the holder, in London in sterling at the fixed rate of 4·86½ dollars to the pound. The offer was in terms made " subject to the approval by our counsel of necessary formalities."

The respondents were the holders of a bond into which one of the Notes above referred to had been converted. The bond, the terms of which are set out in extenso in the judgment of Lord Atkin, was described as a twenty-year 5½ per cent. coupon gold bond, and by it the Government of the United Kingdom of Great Britain and Ireland promised to pay the holder the sum of one thousand dollars on February 1, 1937, and to pay interest thereon until the principal sum should be paid. Such principal sum and interest were to be paid at the option of the holder either in New York at the office or agency to be maintained there by the Obligor in gold coins of the United States of America of the standard of weight and fineness existing in February, 1917, or in London, in sterling

(1) [1936] W. N. 325.

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money at the fixed rate of 4·86½ dollars to the pound. Payment was to be made without deduction for British taxes. The bond could be registered in New York.

Interest coupons were attached to the bond by which the Obligor promised to pay to the bearer at the office or agency to be maintained by the Obligor in the City of New York 27·50 dollars gold coin of the United States of America, or, at the option of the holder, in London, in sterling money at the fixed rate of 4·86 dollars to the pound, payment at either place being made without deduction for British taxes present or future, being six months' interest on the bond.

By their petition the suppliants contended that the Obligor contracted to pay to the bearer, upon payment being required and the appropriate interest coupon presented in the City of New York on the due date for any half-yearly interest payment thereunder, such a sum in the money of account of the United States of America as represented the gold value of 27·50 dollars, such gold value to be ascertained in accordance with the standard of weight and fineness existing on February 1, 1917; and that accordingly every " dollar " comprised in the nominal amount of each such payment ought to be treated as representing the price in New York in the money of account of the United States of America (calculated at the due date of payment) of 25·8 grains of gold of the standard of fineness prescribed by the law of the United States existing on February 1, 1917, and that any fraction of a " dollar " ought to be treated as representing the price in New York of a corresponding fraction of 25·8 grains of gold of the same standard of fineness as aforesaid; and that payment in London should be such a sum in sterling as would be equivalent to the sum payable on the same date in the money of account of the United States of America if payment had been required in New York, calculating the sum in sterling at the rate of 4·86½ dollars to the pound sterling.

By his answer and plea the Attorney-General denied that the obligor contracted as alleged, and he contended that the amount payable under the bond, if payment was required in the City of New York, was to be determined by the law of the United States, and he relied upon the provisions of a Joint Resolution of the United States Congress dated June 5, 1933, which, after reciting that the then existing emergency disclosed that obligations purporting to give the obligee a right to require payment in gold or in money of the United States measured thereby obstructed the power of Congress to regulate the value of the money of the United States and were inconsistent with the declared policy of Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts, continued as follows : " Now, therefore, be it resolved by the Senate and House of Representatives of the United States in Congress assembled, that (*a*) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy ; and no such provision shall be contained or made with respect to any obligation hereinafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public or private debts. Any such provision contained in any law authorising obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law ; (*b*) as used in this resolution, the term ' obligation ' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States ; and the term ' coin or currency ' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations." The Joint Resolution also amended a section in a previous Act so that it read as follows : " All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

By virtue of that Joint Resolution the Attorney-General contended that since its date, namely, June 5, 1933, the Obligor was only entitled lawfully to pay, or, alternatively, was under no obligation except to pay interest as provided by the Resolution, by payment of a dollar lawful currency in respect of each nominal dollar of obligation; he further contended that since June 5, 1933, it was unlawful for the Obligor to pay for each nominal dollar of obligation the amount in gold contained in gold coin of the United States of the standard weight and fineness existing on February 1, 1917, which was nominally equivalent to such nominal dollar of obligation. In so far as the holder exercised his option to receive payment of interest in London the Attorney-General contended that the Obligor's obligation was to pay the equivalent in sterling at the rate of 4·86½ dollars to the £ sterling of the nominal amount of the interest coupon.

At the trial evidence was adduced by both parties, and as to three matters, either then or in the subsequent discussions, there was no dispute, these being (*a*) that payment of a dollar debt in gold coin was at all material times illegal according to the law of the United States; (*b*) that the Joint Resolution of Congress had in the United States the force of a statute; (*c*) that that Joint Resolution applied not only to citizens of the United States but also to foreigners and foreign Sovereigns.

Branson J. in his judgment said that the first question to be decided was whether the proper law of the contract was the law of this country or that of the United States. If the matter had related to a contract between subjects of different States, he thought the law applicable would be that of the United States; this, however, was not a contract between subjects, but one to which a Sovereign was a party, and in those circumstances, in view of a dictum of Lord

Romilly in *Smith* v. *Weguelin* (1)—approved by Lord Selborne in *Goodwin* v. *Robarts* (2) to the effect that when the Government of a State contracts a loan in another country, the contract is governed by the law of the State whose Government contracts the loan, and not by the law of the country in which the contract is made—he felt bound to hold that the proper law of the contract was the law of England. He then held that the contract was one for payment in gold coin with an implied term that odd small amounts might be paid in silver and nickel coins, and that if the proper law of the contract was the law of the United States that would be the method of payment; but inasmuch as payment in gold coin in the United States was illegal by the law of that country, the obligation to pay in gold coin in the United States was therefore void. With regard to payment when made in London he held that it should be of such sum in sterling calculated at the rate of 4·86½ dollars to the pound sterling as was equivalent to the nominal amount of the bond or interest coupon. He accordingly entered judgment for the Crown.

The suppliants appealed.

1936. November 2. The judgment of the Court of Appeal (Lord Wright M.R., Slesser and Romer L.JJ.), which was read by Lord Wright M.R., was as follows :—The appeal in this case is against a judgment of Branson J., who has decided against the suppliants, who are the holders of a bond for 1000 dollars issued by His Majesty's Government dated February 1, 1917, and styled "A twenty-year 5½ per cent. Coupon Gold Bond payable February 1st, 1937." The learned judge has held that the contract contained in the bond was to be deemed to be an English contract, though actually made in America; he has decided against the suppliants' petition on the ground that the contract was one to be performed in the United States by the payment of the principal and interest in gold coin. By the law of the United States as from the year 1933 such a payment was unlawful, and he has accordingly dismissed the petition on the ground that an English Court will not enforce the performance of acts in a foreign country in which those acts are contrary to the law of that country. The appellants, while accepting the position that the contract is to be deemed to be an English contract, have contended that the obligations under the contract are not to pay in specie in gold, but that the reference to payment in gold coin is inserted as a measuring rod or measure of liability, and that there is nothing in the recent law of the United States which makes it unlawful to pay the full amount provided for by the terms of the bond, according to the construction for which they contend. It was agreed during the course of the proceedings before Branson J. that the Court should not occupy itself with the question of the technical form of the proceedings. Both parties asked the Court to make a declaration which would determine the rights of the parties. We therefore do not think it necessary to examine the original form of the petition or its subsequent amendment. The question before us is: What is the true meaning of the contract? The Attorney-General in the trial before Branson J. said he was not before the Court on any technicality and invited the judge to give his view as to the rights of a bondholder on presentation of the coupons, or the bonds, in New York, while the United States of America legislation remains as it is at present. We follow the course which he proposed. The bonds were issued in three denominations, 1000 dollars, 500 dollars and 100 dollars. So far as the principal sums are concerned, the provisions are identical, except as to amount, and the same is true in regard to the coupons. There is, however, a special point on the form of the coupon depending on the precise amounts of dollars and fractions of dollars which are payable. The Bond is an engraved document which has at the top a symbolic figure and on each side of the symbolic figure is the sum of 1000 dollars (to take that amount) engraved in a decorative form. Then it is headed: " The Government of the United Kingdom of Great Britain and Ireland Twenty-year $5\frac{1}{2}$ per cent. Coupon Gold Bond payable February 1st 1937," and the operative part proceeds as follows: " The Government of the United

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(1) L. R. 8 Eq. 198, 212, 213.

(2) (1876) 1 App. Cas. 476, 495.

Kingdom of Great Britain and Ireland (hereinafter termed 'Obligor') for value received promises to pay to bearer, or, if this bond be registered, then to the registered holder thereof, the sum of One Thousand dollars on the 1st day of February 1937 and to pay interest on such principal sum at the rate of five and one-half per cent. (5½%) per annum, semi-annually, on the 1st day of August and the 1st day of February in each year, until such principal sum shall be paid, but only upon presentation, and surrender of the coupons for such interest hereto attached as severally they mature. Such principal sum and the interest thereon will be paid at the option of the holder, either in the City of New York, State of New York, United States of America, at the office or agency which will be maintained in the said City by the Obligor for the service of the bonds of this issue in gold coin of the United States of America of the standard of weight and fineness existing February 1917, or in the City of London, England, in sterling money at the fixed rate of $4.86½ to the pound. Payment at either place aforesaid will be made without deduction from either such principal or interest for any British taxes, present or future. This bond will not be redeemed prior to the due date thereof above specified." Then there is a provision for the registration of the bond, as to the principal sum, and there are consequential provisions if the holder is registered. The back of the bond is headed with the name of the Government of the United Kingdom of Great Britain and Ireland and then appears the figure of 1000 dollars in a decorative setting. Then there follow the words, "Twenty-year 5½ per cent. Coupon Gold Bond payable February 1st 1937, Interest payable February 1st and August 1st. Principal and Interest payable at the Option of the Holder in New York or London." There were attached to the bond a series of coupons each for the appropriate amount of half-yearly interest at 5½ per cent. per annum; for instance in the case of a bond for 1000 dollars the coupon is for 27.50 dollars, which involves a fraction of a dollar. The coupon "promises to pay to Bearer, at the office or agency which for such purpose will be maintained by the

Government in the City of New York, United States of America, twenty-seven and 50/100 dollars gold coin of the United States of America, or, at the option of the holder, in London, England, in sterling money at the fixed rate of $4.86\frac{1}{2}$ to the pound, payment at either place being made without deduction for British taxes present or future, being six months' interest on the Twenty-year $5\frac{1}{2}$ per cent. Bond of the Government." There was evidence that $1 gold pieces were only coined in small numbers for a short period many years ago, and there was no gold coinage of any amount at any time of less than 1 dollar.

The loan was duly subscribed, and by February 7, 1919, there remained outstanding twenty-year bonds in the form which I have stated—of which the suppliants held one—amounting in all to 143,587,000 dollars in the three denominations respectively which I have stated. It is not necessary to refer to the actual circumstances under which the loan was first advertised and then accepted. The loan was originally in one year and two year convertible gold notes. An advertisement had been issued and had declared that principal and interest were to be payable at the office of J. P. Morgan & Co., and that on notice the one or two year notes were to be convertible into bonds such as those which I have described. The advertisement was signed by a number of Banks and Issuing Houses in the United States, and the subscription books were to be opened at the office of J. P. Morgan & Co., and the amounts due on allotment were to be payable at the office of J. P. Morgan & Co. in New York. In or about July of 1933 the larger proportion of the outstanding bonds were discharged under an arrangement proposed by the British Government and accepted by the bulk of the bondholders. At the time of the arrangement the Court of Appeal in England had held in the case of *Feist* v. *Société Intercommunale Belge d'Electricité* (1), afterwards reversed by the House of Lords (2), a judgment to which we refer later, that a contract providing that a debt should be discharged by a payment in gold coins could be

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(1) [1933] Ch. 684.

(2) [1934] A. C. 161.

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discharged by payment in bank notes for the nominal amount. It was not then admitted that that decision governed the construction of the words in question, but all the bondholders except those representing 15 million dollars accepted an arrangement under which they were to receive until the date of maturity interest at 2½ per cent. instead of 5½ per cent. per annum, and that instead of each bond of 1000 dollars then worth at par 206*l.*, they should receive a bond to the value of 260*l.* The suppliant is a bondholder who did not fall in with this arrangement, and the petition of right was eventually presented to determine what was the true construction of the bond.

The first question which has to be decided is what is the proper law of the bond. The loan was contracted in the United States; it was issued at the office of the New York bankers, Messrs. J. P. Morgan & Co. The money lent was lent in dollars, and if the bonds were registered at all, they were to be registered in New York and to be transferable by registration there. According to what may be described as the principal option—namely, that principal and interest should be discharged in New York, its performance was to be in the United States of America. Under these circumstances on the principles generally applied in the law of contracts it would naturally be held to be an obligation, the intention of which was that it should be governed by the law of the United States or the law of New York. The learned judge, however, has rejected that conclusion, and we are in agreement with his decision that the proper law of this contract is the law of England. We base our conclusion—as did the learned judge—on the decision of Lord Romilly in *Smith* v. *Weguelin* (1), in which he laid down the principle that where a Government enters into a contract of loan in a country foreign to itself, it must be held exceptionally to the general rule that the contract is to be governed by the law of the country of the Government and not the law of the place where the contract was made or by the law which would generally be applied in a transaction between private persons. Lord Romilly said

(1) L. R. 8 Eq. 198.

this (1): "It is, in my opinion, a complete misapprehension to suppose, that, because a foreign Government negotiates a loan in a foreign country, it thereby introduces into that transaction all the peculiarities of the law in the country in which the negotiation is made. The place where the loan is negotiated does not, in my opinion, in the least degree affect the question of law. The contract is the same, and the obligations are the same, whoever may be the bondholders. Suppose a French or Belgian company residing in Paris or in Brussels instruct their agent in London to subscribe for some of these bonds, is the contract between the Peruvian Government and a French company or between the Peruvian Government and a Belgian company to be regulated by the English law, because the contract is made by their agents in London, or are the contracts to vary according to the domicil of the subscriber to the loan? If the French Government should negotiate a loan on certain specified terms, whether negotiated in Brussels, in London, or in Paris, the same law must regulate the whole, and that law is the law of France, as much as if it had been expressly notified in the articles that the French law would be that by which the contract must be construed and governed. So, if the English Government were to negotiate a loan in Paris or in New York, the English law must be applied to construe and regulate the contract." That statement of principle was approved by Lord Selborne in *Goodwin* v. *Robarts*. (2) It is true that the principle so laid down was not in either case essential to the decision of the matter, either before the Chancery Court or the House of Lords. It was also pointed out that *Smith* v. *Weguelin* (3) is not cited as an authority for the particular proposition in the English works of authority on the Conflict of Laws, such as those by the late Professor Dicey or by the late Professor Westlake. It is, however, cited by Professor Beale in his work on the Conflict of Laws. At p. 1102 of the edition of 1935, vol. 2, that learned author states as part of the law of England on this point that "when a foreign Government is a party to a contract, the law of

(1) L. R. 8 Eq. 212.
(2) (1876) 1 App. Cas. 476, 494.
(3) L. R. 8 Eq. 198.

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such Government is applied," and he quotes *Smith* v. *Weguelin*. (1) We agree with the learned judge that we ought to follow this authority and apply it in the present case. There are special features which exist in the case of a contract by a Government which may well make it the proper inference that contracts into which they enter are to be governed by the law of that Government. Any such contract can only be put in suit against the Government, if at all, in the Courts of their own country, and though it is true that the Government may submit to the jurisdiction of a foreign Court either by itself bringing an action or by accepting service of proceedings in that foreign Court and waiving its immunity, still any such course is entirely at the discretion and the volition of the Government, and that being so, the Court is entitled to infer that the intention of the contract is that it should be governed by the law of the Government in question. As an analogy may be cited cases where the parties to a contract have agreed to submit possible disputes under it to a forum in a particular country. In such cases the inference of intention is that the law of that country shall govern the contract: see *N. V. Kwik Hoo Tong, etc.* v. *Finlay & Co.* (2), especially the observations of Lord Dunedin. (3) Applying these principles to the present case we agree with Branson J. that the law of the bonds in question is the English law.

It is on the question of what is the true construction of the contract on the basis of English law that we find ourselves in disagreement with the learned judge. The question of the construction of what is called the gold clause in a contract involving payment of money, in particular under bonds and obligations such as those in question, has been the subject recently of a number of decisions. In regard to an English contract the governing decision must be that of the House of Lords in *Feist* v. *Société Intercommunale Belge d'Electricité*. (4) The same principles of construction have been applied by the Supreme Court of the United States in

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(1) L. R. 8 Eq. 198.
(2) [1927] A. C. 604.
(3) [1927] A. C. 608.
(4) [1934] A. C. 161.

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the case of *Norman* v. *Baltimore & Ohio Railroad Co.* (1), and, as we think, in other cases before that Court. It has also been applied in decisions of the Permanent Court of International Justice sitting at The Hague, which are reported in the publications of that Court, Series A; in particular we may refer to Judgment No. 14, concerning the payment of the Serbian loans, reported in that volume at p. 5. The uniform effect of these judgments as we read and understand them is that the gold clause has not the effect of constituting the contract a bullion contract or even a money contract requiring payment in specie or in the specific gold coin mentioned. The reference to the gold dollar or the gold franc, or whatever the unit of account may be, is not intended to define a mode of payment, but to fix a measure of value. To quote the language of the Supreme Court of the United States in *Norman's* case (2): "The gold clauses now before us were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money. The bonds were severally for the payment of one thousand dollars. We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed," or, as the Supreme Court said in *Perry* v. *United States* (3): "We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium of payment." But for an English Court considering an English contract, the governing authority is the decision of the House of Lords in *Feist's* case. (4) The judgment of the House was given by Lord Russell of Killowen, with whom the other members concurred. In that case the terms which provided for the payment of the amount of the bond, 100*l.*, were contained in clause 1: "100*l.* in sterling in gold coin of the United Kingdom of or equal to the standard

(1) (1935) 294 U. S. 240.
(2) 294 U. S. 302.
(3) (1935) 294 U. S. 330, 348.
(4) [1934] A. C. 161.

of weight and fineness existing on September 1st, 1928." There was a similar provision as to the payment of the interest, and in clause 4 it was provided that the bond was to be " one of an authorised issue of bonds of the company of an aggregate principal amount not exceeding £500,000 in sterling in gold coin of the United Kingdom at any one time outstanding." The coupons which related to the interest at 5½ per cent. payable half-yearly, contained a provision that the sum of *2l.* 15*s.* was to be paid " in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September 1928." The bond in that case contained in each of the two top corners a symbol and the figure of 100*l.* in an ornamental border. Lord Russell of Killowen, in his judgment, came to the conclusion that it was apparent from the contents of the document that the parties did not use the words of the gold clause in accordance with the literal meaning which they would bear if considered apart from the rest of the document and the circumstances which surrounded its execution, in particular because the interest could not be paid in gold coin of the United Kingdom. He also arrived at the same conclusion by pointing out that according to its strict reading the coins tendered would all have to be coins of the exact standard of weight and the exact standard of fineness specified in the Coinage Act of 1870 without any remedy, allowance or variation from the standard. He goes on to say: " I therefore ask myself this question. If the words of the gold clause cannot have been used by the parties in the sense which they literally bear, ought I to ignore them altogether and attribute no meaning to them, or ought I, if I can discover it from the document, to attribute some other meaning to them ? Clearly the latter course should be adopted if possible, for the parties must have inserted these special words for some special purpose, and if that purpose can be discerned by legitimate means, effect should be given to it. In my opinion, the purpose can be discerned from clause 4, in which the reference to gold coin of the United Kingdom is clearly not a reference to the mode of payment but to the measure of the company's obligation. So, too, condition 6, which again is a clause not directed to mode of payment, but to describing and measuring liability, shows that the words are used as such a measure. In just the same way I think that in clauses 1 and 2 of the bond the parties are referring to gold coin of the United Kingdom of a specific standard of weight and fineness not as being the mode in which the company's indebtedness is to be discharged, but as being the means by which the amount of that indebtedness is to be measured and ascertained. I would construe clause 1 not as meaning that 100*l*. is to be paid in a certain way, but as meaning that the obligation is to pay a sum which would represent the equivalent of 100*l*. if paid in a particular way, in other words, I would construe the clause as though it ran thus (omitting immaterial words) 'pay . . . . in sterling a sum equal to the value of 100*l*. if paid in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928.' I would similarly construe clause 2. I am conscious, my Lords, that this construction strains the words of the document, and that it fits awkwardly with some of its provisions. Thus, for instance, the half-yearly payments in accordance with the coupons (which are described in clause 2 as equal) may in fact not be equal. But I prefer this to the only other alternatives—namely, attributing no meaning at all to the gold clause, or attributing to it a meaning which from other parts of the document and the surrounding circumstances the parties cannot have intended it to bear." His Lordship also quotes a passage from the decision of The Hague Court, which has been already mentioned, and the way in which he introduces the quotation is very significant. He says: "I do not, I need hardly say, treat these as in any way binding upon us. Indeed the relevant facts and words under consideration were very different from those which have been under consideration here. I would like, however, to cite one passage as stating happily and succinctly the considerations and principles which have influenced me in arriving at the conclusion which I have reached. It occurs in the judgment dealing with certain Serbian loans stated to be payable both as to principal and interest in gold. It runs thus: 'As it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous, and as the definitive use of the word "gold" cannot be ignored, the question is: What must be deemed to be the significance of that expression? It is conceded that it was the intention of the parties to guard against the fluctuations of the Serbian dinar, and that, in order to procure the loans, it was necessary to contract for repayment in foreign money. But in so contracting the parties were not content to use simply the word "franc," or to contract for payment in French francs, but stipulated for "gold francs." It is quite unreasonable to suppose that they were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value. The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be, not to construe, but to destroy it.'" We particularly refer to this part of his Lordship's judgment because it illustrates a matter of very considerable importance. The gold clauses in bonds and obligations are very common in international contracts and in every part of the world. It would be a very serious matter if contracts of that character were treated by particular Courts as having a different meaning, in the absence of language and surrounding circumstances of a decisive character compelling that conclusion. The construction of such commercial clauses ought to be as far as possible uniform unless there are the strongest considerations involving a different construction.

The learned judge has found in the present case that there were features which entitled him, or required him, to distinguish the bond in question from that before the House of Lords in the case I have just cited. In particular he relies on a difference in the circumstances surrounding the issue of the bond in *Feist's* case (1) and those surrounding the issue of the bond now in question. He says: "I am satisfied upon the evidence that the gold clause was inserted in that limb of the provision as to payment which relates to payment in New York, not with any special reference to any possibility of the United States of America going off the gold standard, but as a customary clause in use in similar contracts in the United States of America for some 47 years, the practical operation of which was fully understood. There is no need to strain any of the language of the document, unless it be straining it first to imply a term that any small sum for the payment of which no gold coin was available should be discharged in silver or nickel coins of legal tender and to construe the expression 'gold coin of the standard of weight and fineness existing in February 1917' as intending gold coin which would pass as legal tender under the statutes enacting that standard. I conclude, therefore, that the obligation of this bond is to pay in the United States in gold coin of that country equal in weight and fineness to that which was legal tender in February, 1917, and where the sum is too small to be so paid, then in silver or nickel coins of legal tender there." We are unable to concur in that view of the position. We cannot find any substantial distinction between the language of the bond in question and that which was being considered in *Feist's* case. (1) It is true that at the date of the loan, 1917, the United States were on the gold standard and that the paper dollar was convertible into gold. The evidence of the American lawyers before the Court was that for practicable purposes at that time no one drew any distinction between the paper dollar and the gold dollar, and the evidence was that in practice even in contracts containing gold clauses, which were very common in long term obligations, gold would not be tendered in payment. After the Civil War there had been in America very serious depreciation of the currency, and there seems to be no doubt that the whole object of inserting the gold clauses originally had been to provide against the risk of any possible future depreciation in the currency. It was for that reason that such clauses were common in the United States. Such depreciation in the currency could well be provided

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(1) [1934] A. C. 161.

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for by a clause the effect of which was that if the currency were depreciated below the value of the standard weight and fineness of the gold dollar as at the date at which the debt was contracted, the obligation should be construed as an obligation to pay, when the time for payment came, such a number of the dollars then current as would be equivalent in gold value to the dollars stipulated in the gold clause. In that way the possible depreciation of the dollar would be provided for, and the lender would not be prejudiced by the de-valuation in the currency; in other words, to apply that to the existing facts of this case, the facts are that at the present time the equivalent of 1000 gold dollars—taking their value as it was in 1917 while the dollar was convertible into gold and before it was de-valued as it was in 1933—is 1690 dollars, and it is that amount to which the suppliants contend they are entitled, as matters now stand, in discharge of the obligation to pay 1000 dollars in gold coin of the United States of the standard of weight and fineness existing at February, 1917. The obligation thus becomes an obligation of an amount which can only be fixed from time to time by ascertaining the gold value of the existing paper currency. That, however, is an ordinary operation in finance and presents no difficulty. The effect of this construction is to secure the lender against the risk of the dollar depreciating. We have already quoted the view of the Supreme Court of the United States to the effect that such was the purpose of these clauses. The position is stated very succinctly by Stone J., concurring with the majority, in *Perry's* case (1) in the following terms: "I do not doubt that the gold clause in the Government bonds, like that in the private contracts just considered, calls for the payment of value in money, measured by a stated number of gold dollars of the standard defined in the clause; *Feist* v. *Société Intercommunale Belge d'Electricité;*(2) *Serbian and Brazilian Bond Cases,*"(3) and he gives the references. Then he proceeds: "In the absence of any further exertion of governmental power, that obligation plainly could not be satisfied by payment of the same number of dollars, either specie or paper, measured by a gold dollar of lesser weight, regardless of their purchasing power or the state of our internal economy at the due date." In the gold clause cases the dissenting minority shortly expressed the same opinion at p. 366, in an opinion which was common both to *Norman's* case (1) and *Perry's* case (2): "That the holder of one of these certificates was owner of an express promise by the United States to deliver gold coin of the weight and fineness established by statute when the certificate issued, or if such demand was not honoured to pay the holder the value in the currency then in use, seems clear enough. This was the obvious design of the contract." We find it impossible to accept the construction adopted by the learned judge, that the bonds in question were bonds for payment in gold coin and in gold coin alone. In our opinion, the view most favourable to the suppliants that could be accepted is that expressed in the opinion last quoted, which would give the holder the right to claim either the gold coin itself, or, failing that, the value in the currency then in use; if that view were accepted, the contract would be performable in either mode. We prefer to accept the construction we have stated, on the authority of *Feist's* case, (3) but even on the view just stated the difficulty which led the learned judge to come to the decision which he did would not arise. His conclusion was that as the contract was performable by the delivery of gold coin alone, except as regards the small amounts payable under the coupons, it could not be performed in the United States without breaking the law as established by the Acts of Congress in 1933.

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(1) 294 U. S. 358.

(2) [1934] A. C. 161.

(3) Collection of Judgments, Series A, No. 14, No. 15.

It has been accepted by both sides that in and from 1933, when the United States went off the gold standard, it has been unlawful in the United States to make or receive payment of a debt in gold, and the learned judge has accordingly held, applying his view of the bond, that its obligation could only be discharged by a payment in gold and that such

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(1) 294 U. S. 303.
(2) Ibid. 330.
(3) [1934] A. C. 161.

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payment was unlawful now in America and could not be enforced in this country. If the premise is right, that conclusion undoubtedly follows. We need only refer to one authority for the well-known proposition that an English Court will not enforce a contract where performance of that contract is forbidden by the law of the place where it must be performed. That authority is *Ralli Bros.* v. *Compañia Naviera Sota y Aznar.* (1) The question there was as to the amount of freight which could be claimed by a Spanish shipowner under an English charterparty which was to be construed according to English law. Part of the freight was to be paid by the charterers in Spain. When the vessel arrived and the balance of the freight was payable in Spain, a law had been passed in Spain prohibiting payment of freight above a certain amount per ton. The charterparty freight was at a much higher rate and it was held that so much of the contract as required payment of freight in excess of the legal amount was invalid and could not be enforced against the charterers. Lord Sterndale M.R. quoted with approval a passage from Professor Dicey's work on the Conflict of Laws, 2nd ed., p. 553, (2) where he says: " A contract . . . . is, in general, invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed." We accept that principle, just as the learned judge did. Indeed, it is too well established now to require any further discussion. It is based on the principle that it is contrary to the comity of nations that the Court of one country should seek to enforce the performance of something in another country which is forbidden by the law of that country. But according to the construction of the contract which we accept, there is no obligation to pay in gold coin. The reference to the gold coin of the United States is merely in order to fix a measure of value or a scale of payment which will apply where the currency depreciates or is de-valued, but the payment of that amount can lawfully and properly be made in the currency of the day in the country when the obligation falls due.

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(1) [1920] 2 K. B. 287.

(2) 5th ed., p. 657.

If that is the true construction of the bond then we think it is clear that no question of illegality by the law of the United States can arise. It is true that in 1933 there was a resolution of Congress, the terms of which have been referred to in argument and require consideration. The resolution in question is described as a joint resolution approved by Congress on June 5, 1933, and it is described as: "To assure uniform value to the coins and currencies of the United States." It proceeds: "Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction, and whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled that (*a*) every provision (contained in or made with respect to any obligation) which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorising obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law." The

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evidence of the United States lawyers is clear and unanimous that that joint resolution, which has the force of law, though it provides that "every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public or private debts," does not make it unlawful for a debtor to discharge his full obligation. The distinguished lawyers who gave evidence were all agreed on that point; the resolution disentitled the creditor to claim more than the amount provided by the resolution, but if the debtor thought fit to satisfy the obligation according to its full and original tenor, there was nothing to prevent him from tendering that amount to the creditor and nothing to prevent the creditor from accepting that amount. All that was said was that the difference between the obligatory amount and the original contract amount could not be regarded as other than a gift. However regarded, it follows clearly from that view of the resolution that there would be nothing unlawful under the law prevailing at the place of payment to render it unlawful for the British Government to pay over the full amount to its creditors under the bond. That indeed is the view accepted by the learned judge on that hypothesis. If the construction of the bond which we accept, but which he rejected, is the right construction, then the rule in *Ralli Bros.* v. *Compañia Naviera Sota y Aznar* (1) does not apply. It only applies, in our opinion, if the act in question is prohibited by the foreign law.

It was contended that as the resolution in question stated a ground of public policy which would be contravened by payment in full under the gold clause in the contract, that therefore the English Court should not give a judgment which would have the effect of running counter to that public policy of the United States. No authority was cited for that proposition. The statements of the law on this point have all proceeded on the basis that the term of the contract under consideration, if the English Court is to refuse to enforce it,

(1) [1920] 2 K. B. 287.

must be one which is contrary to and forbidden by the law of the country. It is clear that the law of the United States does not prohibit a creditor honouring his promise to discharge according to the full measure of the gold clause, though he cannot be compelled, since the joint resolution, to do so.

We have so far been dealing only with that part of the bond which relates to a payment in the United States of America. It is necessary to refer to the alternative option which the holder has of requiring payment in the City of London, England, in sterling money at the fixed rate of S4.86½ to the pound. In our opinion if that option is exercised the holders' rights are fixed by that part of the clause which begins " or in the City of London, England, as the fixed rate of $4.86½ to the £ " ; in other words, the earlier part of the paragraph which relates to gold coin of the United States of America is inapplicable. The two methods of payment are alternative and are exclusive of each other. That, we think, appears from the form of the paragraph : " Such principal sum and the interest thereon will be paid at the option of the holder, either "—and then come the words which define the scope of the obligation if the payment is to be made in America, and then follow the words which define the scope of the obligation if the option is exercised for payment in the City of London. To the latter option the words " in gold coin of the United States " and so forth, do not apply at all, and therefore if the London option is exercised, what the holder is entitled to is such an amount of sterling as represents the amount of the bond, say 1000 dollars. This construction of the London option has the effect of rendering that option irrelevant to the construction of the New York option. The two options, in our opinion, are entirely independent. Each provides for the payment of a particular sum in a particular place in a particular way. According to the New York option, the obligation is to pay the equivalent of 1000 gold dollars in the precise form stated. In the London option the obligation is to pay 1000 dollars according to the measure of value in sterling indicated ; the gold clause is not imported in any way into the London option.

For all these reasons we think that the appeal ought to be allowed and that it should be declared that the holders are entitled to be paid at the appropriate dates both on the coupons and on the principal obligation, (*a*) if the New York option is exercised, such an amount in dollars as is equivalent to the value in currency at that time of 1000 gold dollars specified in the obligation; (*b*) if the London option is exercised, the holders are entitled to be paid the equivalent of 1000 dollars at the fixed rate of $4·86½ to the pound in sterling money of England. The same principles apply mutatis mutandis in the case of the interest payments.

The appeal will be allowed with costs.

The Crown appealed.

1937. Jan. 18, 19, 21, 22. *Sir Donald Somervell A.-G.*, *Gavin Simonds K.C.*, *Andrewes-Uthwatt*, and *Valentine Holmes* for the appellant. The first question is, What is the "proper law of the contract"? In Dicey's Conflict of Laws, 5th ed., r. 155, p. 628, this is defined as " the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves"; and r. 161, sub-r. 3, states that in the absence of countervailing considerations it is to be presumed that the proper law of the contract is the law where it was made, this presumption applying with special force where the contract is to be performed in that country, and that where a contract is made in one country but is to be performed wholly or partly in another, the proper law of the contract, especially as to the mode of performance, is to be presumed to be the lex loci solutionis; see also *Jacobs* v. *Crédit Lyonnais* (1) and *N. V. Kwik Hoo Tong Handel Maatschappij* v. *Finlay & Co.* (2) If, therefore, the circumstances of this contract are considered, each of them points to the proper law being that of the United States. The offer of the loan was made in the United States; it was made " subject to the approval by our counsel of necessary formalities"; the bond is in a form usual in the

(1) (1884) 12 Q. B. D. 589.

(2) [1927] A. C. 604.

United States; the particular clause giving rise to the litigation is well known there, and is unusual in this country; the register is to be kept in New York; and the sums mentioned are in dollars. It follows, therefore, in view of the admission that the Joint Resolution of Congress has the force of law, that the suppliants are entitled to be paid only dollar for dollar in New York. It has been decided, however, by Branson J. and the Court of Appeal that inasmuch as the British Government is the Obligor, English law is on that account the proper law of the contract, and in support of that view certain observations of Lord Romilly M.R. in *Smith* v. *Weguelin* (1), cited with approval by Lord Selborne in *Goodwin* v. *Robarts* (2), have been relied upon. No such wide proposition as that stated by Lord Romilly is to be found in Dicey's Conflict of Laws or in Beale's Conflict of Laws. In the latter work, vol. ii, pp. 1101, 1102, the author, after quoting with approval Dicey's definition of "Proper Law of the Contract," says that in applying it certain presumptions are allowed, or, at least, certain circumstances are given weight, among these being the fact that the contract is entered into by a foreign Government. That, however, is no more than a presumption which cannot prevail when all the relevant circumstances point, as they do here, to another law as the proper law to be applied. Moreover, there is no justification in principle for the view taken by the Court below that the law of the Sovereign must apply because he can be sued only, if at all, in his own country. The forum in which a party can be sued cannot of itself be a guide as to the proper law of the contract. So far as Lord Romilly's observations lead to the conclusion that in all cases where a Sovereign is a party to a contract the law of his country is the law to be applied, it is submitted that it is wrong and should not be followed.

Secondly, even assuming that the appellant is wrong in his first contention, and that English law is the law of the contract, the law of the United States must be applied in determining what is a discharge of the obligation to pay in New York contained in the bond. As to this the Joint

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(1) L. R. 8 Eq. 198, 212, 213.

(2) 1 App. Cas. 476, 495.

Resolution prescribes a method by which the bonds are to be discharged—namely, dollar for dollar. For this contention *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* (1) is a clear authority. In that case it was held that where in an English contract governed prima facie by English law there is a provision for performance in another country, the presumption is that performance is to be in accordance with the local law. See also to the same effect *In re Chesterman's Trusts.* (2)

Thirdly, as the Joint Resolution prohibits payment in gold as being against public policy, it would be against the comity of nations for an English Court to require performance in the United States in a manner inconsistent with the terms of the Joint Resolution: *Ralli Bros.* v. *Compañia Naviera Sota y Aznar* (3); see in particular the observations of Scrutton L.J. (4): "Where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country should not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent States." Reliance was placed by the respondents on *In re Missouri Steamship Co.* (5) as deciding that the Courts of this country will not in every case give effect to the laws of another country. In that case a charterparty contained a stipulation exempting the owners from liability in respect of negligence of the master and crew—a stipulation which was void by the law of Massachusetts, where the charterparty was entered into—and our Courts gave effect to the clause. But there it appeared that the ship was British and that the parties intended the contract to be governed by English law, and in these circumstances the clause in question was held to be enforceable in this country.

Fourthly, on its true construction the gold clause in the bond provides the mode of payment, that is, provides for payment in New York, both of the principal sum and the periodical interest, in gold coin. In *Feist* v. *Société*

(1) [1934] A. C. 122.
(2) [1923] 2 Ch. 466.
(3) [1920] 2 K. B. 287.
(4) [1920] 2 K. B. 304.
(5) (1889) 42 Ch. D. 321.

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Intercommunale Belge d'Electricité (1) it was pointed out that neither party to the bonds there in question could have contemplated payment being actually made in gold coins. (2) That assumption cannot be made in this case, inasmuch as gold coin and equivalent gold certificates were in circulation when the loan was made. A clause requiring payment in gold coins has a long history in the United States. Further, the words in the present bonds, "One Thousand Dollars" are not qualified as were those in *Feist's* case (1), where the bond was "one of an authorised issue of bonds of the Company of an aggregate principal amount not exceeding 500,000*l.* in sterling in gold coin of the United Kingdom at any one time outstanding," and upon that description great reliance was placed. There is nothing equivalent to that in this bond; indeed all the circumstances which led to the construction placed upon the bond in *Feist's* case (1) are absent in the present case.

[*Norman* v. *Baltimore and Ohio Railroad Co.* (3) and *Perry* v. *United States* (4), were also referred to.]

Sir William Jowitt K.C., *Cyril Radcliffe K.C.*, and *G. C. Dunbar* for the respondents. First, the bond in this case is like that in *Feist's* case (1), a gold value contract and not a gold coin contract.

Secondly, the proper law applicable in the case of such contracts depends upon the intention of the parties: *Lloyd* v. *Guibert* (5); and here we say the proper law is English. While it is true that where an English contract calls for the performance of an act in a foreign country, our Courts will not enforce the performance if thereby something illegal would have to be done in the foreign country; but where nothing illegal has to be done in the foreign country in the performance of the contract the English Courts will not take account of the provisions of a local statute which purport to deal not only with the mode of discharging the obligation but with the obligation itself: see per Bowen L.J. in *Jacobs* v. *Crédit Lyonnais* (6); *In re Missouri Steamship Co.* (7) What the Joint Resolution has purported to do is to alter the contract so as to give the debtor the right to pay, say 100 instead of 160 dollars; English law does not incorporate such an alteration as that into the contract. In the *Missouri* case (1) Lord Halsbury L.C. brushed aside the suggestion that a party can escape his obligations by pleading that they are against the public policy of the foreign State. It is accurately stated in Dicey's Conflict of Laws (p. 667) that the rules on the subject of the proper law "are in no sense rigid canons of construction from which a Court will not deviate. They are rather presumptive rules of evidence which are in fact frequently followed by English judges, but which are not in any degree irrebuttable, and are liable to be displaced by circumstances of any kind which in a given case influence the opinion of the Court." Here it is inconceivable that the burden of the obligation could be increased by a foreign Legislature, and we contend that it is equally incongruous that the burden can be decreased by the foreign Legislature. The principle that the law applicable depends upon the intention of the parties must have been in the mind of Lord Romilly in making the observations he did in *Smith* v. *Weguelin*. (2) In *Goodwin* v. *Robarts* (3) and *Twycross* v. *Dreyfus* (4), where the nature and obligatory force of such bonds were considered, it was said not to be accurate to speak of the documents as contracts; they were obligations of honour. That being so the respondents are entitled to look for the due fulfilment of the promise contained in the bond. The decisions of the Permanent Court of International Justice at The Hague support the view for which the respondents contend—see the *Serbian Loans* case (5), the *Brazilian Loans* case (6), and the *Swedish Loans* case (7), where it was laid down that where a Government is borrowing it cannot be presumed that the Sovereign State has made the substance of its debt and the validity of the obligations accepted by it in respect thereof subject to any law other than its own.

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(1) [1934] A. C. 161.
(2) Ibid. 171.
(3) 294 U. S. 240.
(4) 294 U. S. 330.
(5) (1865) L. R. 1 Q. B. 115.
(6) 12 Q. B. D. 589, 601, 604.
(7) 42 Ch. D. 321.

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(1) 42 Ch. D. 321.

(2) L. R. 8 Eq. 198.

(3) 1 App. Cas. 476.

(4) (1877) 5 Ch. D 605.

(5) (1929) Collection of Judgments, Series A, No. 14.

(6) (1929) Ibid. No. 15.

(7) (1935) Plesch's Gold Clause, 2nd ed., 66.

In those cases therefore the bondholders were held entitled to recover the full amount of the bond calculated as we contend the sum in the present case should be calculated. The fact that in this case the bonds were issued in New York is of no importance. As to the Notes, even assuming that they were United States contracts, their surrender for the bonds repatriated them, and the quantum of obligation is governed by English law, as is further shown by the provision that no British taxes are to be deducted.

Sir Donald Somervell A.-G. in reply. In the cases before the Permanent Court of International Justice cited on behalf of the respondents the bonds there in question were issued in several countries, thus differing materially from those with which we are concerned in this case. It was also pointed out in the *Serbian Loans* case (1) that "it may happen that the law which may be held by the Court to be applicable to the obligation in the case, may in a particular territory be rendered inoperative by a municipal law of this territory,—that is to say, by legislation enacting a public policy the application of which is unavoidable even though the contract has been concluded under the auspices of some foreign law." Neither of these cases nor the *Swedish Loans* (2) case is an authority for the contention that in this case the respondents are entitled to recover the larger amount in New York. With regard to the argument based on the clause in the bonds that no British taxes will be deducted, it is to be observed that it being well known that in the absence of such words tax would be deducted at the source, it was necessary to insert the clause to make it clear that no such deduction would be made.

The House took time for consideration.

Jan. 28. Their Lordships stated that the appeal would be allowed and that the reasons would be given on a later date.

March 15. LORD ATKIN. My Lords, this is an appeal brought in a petition of right in which the suppliants claim to have determined by the Courts their rights as holders of bonds and the annexed coupons issued by the British Government in the U.S.A. in 1917. The bonds contain what is now known as a gold clause in a well known form. The question is whether the holders are entitled to be paid in New York in American currency the present value of the amount of gold represented by the nominal amount of the bonds in gold coins of the specified fineness of 1917, or are only entitled to be paid in New York in American currency the nominal amount of the bonds. The suppliants do not appear to have tendered either bond or coupon at the place of payment in New York so as to be able either to claim in debt or damages; but the Attorney-General representing the Crown agrees with the suppliants in desiring the real questions at issue to be determined, and the Courts have proceeded on that footing.

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(1) (1929) Collection of Judgments, Series A, No. 14, p. 41.

(2) Plesch's Gold Clause, 2nd ed., 66.

Various questions have been raised in this case; but that which comes first under consideration is what is the proper law of the contract: for if that be answered in one way no further issues remain. I will therefore proceed to discuss that matter. The legal principles which are to guide an English Court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed the intention will be presumed by the Court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion the Court will be guided by rules which indicate that particular facts or conditions lead to a prima facie inference, in some cases an almost conclusive inference, as to the intention of the parties to apply a particular law: e.g., the country where the contract is made, the country where the contract is to be performed, if the contract relates to immovables the country where they are situate, the country under whose flag the ship sails in which goods are contracted to be carried. But all these rules but serve to give prima facie indications of intention: they are all capable of being overcome by counter indications, however difficult it may be in some cases to find such. The principle of law so stated applies equally to contracts to which a sovereign State is a party as to other contracts. In the present case both Branson J. and the Court of Appeal appear to have considered themselves bound by authority to hold that where a sovereign State is party to a contract the only proper inference to be drawn is that it did not intend that any system of law should be applied to its contract other than its own : and that this conclusion is either necessitated or reinforced by the consideration that only in its own Court if at all can it be sued. For this proposition two cases are cited. The first is *Smith* v. *Weguelin*. (1) That was the case of a Peruvian loan negotiated in this country. So far as I can see Lord Romilly in dealing with the topic is doing no more than negativing a contention that where a Government negotiates a loan in a foreign country the law of that country is necessarily the law of the contract. He points to the case where a foreign loan in this country is negotiated at the same time in the same terms in different foreign countries as conclusive to negative the inference that English law is intended, and he proceeds: " So, if the English Government were to negotiate a loan in Paris or in New York, the English law must be applied to construe and regulate the contract." I cannot think that Lord Romilly was intending to lay down a rule applicable in all circumstances, as, for instance, if the contract expressly made the foreign law applicable. His remarks are in fact obiter, but in any event do not I think purport to lay down a rule of universal application. The other case is *Goodwin* v. *Robarts* (2), in a passage in the speech of Lord Selborne approving the remarks of Lord Romilly in *Smith* v. *Weguelin* (3) with which Lord Selborne was specially acquainted, having been counsel for the successful party. In *Goodwin* v. *Robarts* (2) what Lord Selborne said had little to do with the ground of the decision. The question in that case was whether the scrip of a Russian loan was negotiable. It had been agreed in the Divisional Court that if English law applied common law principles prevented the extension of negotiability to any choses in action not made so by statute. The Court of Exchequer held that the scrip was governed by Russian law and that the question did not arise. In the Exchequer Chamber Cockburn L.C.J. in that remarkable judgment which is one of the charters of the liberty of the common law pronounced that the proper law was immaterial, for by English law commercial custom could attach the qualities of negotiability to forms of contract hitherto not negotiable. The House of Lords took the same view. It would appear therefore that these cases afford little authority for the proposition. In principle it must be ill-founded. It cannot be disputed that a Government may expressly agree to be bound by a foreign law. It seems to me equally indisputable that without any expressed intention the inference that a Government so intended may be necessarily inferred from the circumstances: as where a Government enters into a contract in a foreign country for the purchase of land situate in that country in the terms appropriate only to the law of that country: or enters into a contract of affreightment with the owners of a foreign ship on the terms expressed in a foreign bill of lading, or employs in a foreign country foreign labour in circumstances to which foreign labour laws would apply. It appears therefore that in every case whether a Government be a party or not the general principle which determines the proper law of the contract is the same: it depends upon the intention of the parties either expressed in the contract or to be inferred from the terms of the contract and the surrounding circumstances, and in the latter case the inference may be drawn that the parties intended a foreign law to apply. The circumstance that a Government is a party is entitled to great weight in drawing the appropriate inference, but it is not conclusive and is only one factor in the problem.

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(1) L. R. 8 Eq. 198.
(2) 1 App. Cas. 476, 495.
(3) L. R. 8 Eq. 198, 213.

We can therefore approach the question what is the proper law of this contract untrammelled by any rule binding us to hold that it is English law. The contract had its origin in the fact that in 1917 under the powers of the War Loan Act, 1916, the British Treasury arranged to borrow the sum of $250,000,000 in the United States of America upon the security of Treasury Notes payable as to $100,000,000 one year after date and as to $150,000,000 two years after date. The Notes were to be secured by the deposit with the Bankers Trust Company, New York, of certain securities on the terms and conditions contained in a pledge agreement which is dated February 1, 1917.

It should be noted that no question arises as to the authority of the Treasury to raise money on these terms, or to agree to apply foreign law to the loan if desired. The War Loan Act, 1916, empowers the Treasury to raise money on such terms as it thinks fit, and it would seem obvious that at that stage of the Great War neither the Government nor the Legislature would be likely to hesitate to adopt the law of any civilized country if the terms of the Loan were otherwise agreeable. The only provision of the War Loan Act that is relevant is the provision that the loan is repayable out of the Consolidated Fund, a domestic matter which only concerns the authority to pay. I have thought it necessary to mention this matter, for it is obvious that Government contracts may well be made by authority of and regulated by statutes which will themselves determine the law to be applied; for at least as far as they are applicable an English Court would have to follow them. There is no difficulty of that kind in the present case: and this is further indicated by the fact that it is the British Government itself which is contending for the application of the American law.

My Lords, it appears to me essential to keep in mind the whole of the documents which in sequence led to the creation of the obligation of the British Government expressed in the bonds in suit. They are the foundation of the reasoning which leads me to the conclusion that not English but American law is the proper law of this contract. It is necessary unfortunately that they should be set out in full.

DOCUMENTS.

OFFER.

FINAL PROOF.

$250,000,000.

H. L. (E.)
1937
REX
v.
INTERNATIONAL TRUSTEE FOR THE PROTECTION OF BONDHOLDERS AKTIENGESELLSCHAFT.

Lord Atkin.

UNITED KINGDOM OF GREAT BRITAIN AND IRELAND ONE-YEAR AND TWO-YEAR 5½ PER CENT. SECURED LOAN CONVERTIBLE GOLD NOTES.

Dated February 1, 1917.

Interest payable February 1 and August 1.

$100,000,000 One-Year Notes due February 1, 1918.

$150,000,000 Two-Year Notes due February 1, 1919.

Principal and interest payable at the office of J. P. Morgan & Co.

Convertible upon notice, at the option of the holder, at any time before maturity, or (if called for earlier redemption) at any time until and including the date of such redemption, into Twenty-Year 5½ per cent. Bonds of the United Kingdom of Great Britain and Ireland, payable February 1, 1937, and not subject to prior redemption.

Principal and interest of the Notes, and of the bonds into which they may be converted, is to be payable, without deduction for British taxes, present or future, in New York in United States gold coin or, at the option of the holder, in London in sterling at the fixed rate of $4·86½ to the pound.

Coupon Notes in denomination of $1000, $5000 and $10,000.

Redeemable at the option of the Government, in whole or in part, on thirty (30) days notice, as follows:

	One-Year Notes.	Two-Year Notes.
From February 1, 1917 to January 31, 1918.	101 and interest.	102 and interest.
From February 1, 1918 to January 31, 1919.		101 and interest.

The Notes are to be secured by pledge with Bankers Trust Company, New York, under a pledge agreement executed by the Government, of securities approved by J. P. Morgan & Co., of an aggregate value of not less than $300,000,000 calculated on the basis of the then prevailing markets, sterling securities being valued in dollars at the prevailing rate of exchange, viz.:—

Group I.—Stocks, bonds and/or other securities of

American Municipalities and Corporations and of the Canadian Pacific Railway Company and Bonds and/or other obligations (either as maker or guarantor) of the Government of the Dominions of Canada, the Colony of Newfoundland and/or provinces of the Dominion of Canada; and/or approved Canadian municipalities:

Aggregate value not less than $150,000,000.

(Of the foregoing there will be somewhat over $100,000,000 in value in the securities of municipalities and corporations of the United States and of the Canadian Pacific Railway Company.)

Group II.—Bonds and/or other obligations (either as maker or guarantor) of any or all of the several following Governments, to wit: Argentine, Chile, Cuba, Commonwealth of Australia, Egypt, Japan, New Zealand and Union of South Africa, and/or bonds and/or other obligations of approved Railways in Argentina and/or of the Grand Trunk Railway Company of Canada, and/or approximately $25,000,000 value in bonds and/or other obligations of dividend-paying British railway Companies:

Aggregate value not less than	$150,000,000
Total	$300,000,000

Pending the arrival and deposit of definite securities as above, the Government is to deposit temporarily with the Trust Company either approved New York Stock Exchange collateral or cash.

If the pledged securities depreciate in value, the Government is to deposit additional securities to maintain the 20 per cent. margin.

The Government is to reserve the right from time to time to sell for cash any of the pledged securities, the proceeds of sale to be applied to the retirement of notes by purchase or by redemption by lot.

Upon the retirement of the One-Year notes, or upon reduction of the amount of notes outstanding, through conversion, a proportionate amount of the collateral may be withdrawn approximately rateably from each class.

The Government also from time to time may make substitutions of Securities but such substitutions are not to vary the then relative amounts in value of the groups. All substitutions, withdrawals and valuations of securities are to be approved by J. P. Morgan & Co.

This offering is made subject to the approval by our Counsel of necessary formalities.

We offer the above Notes for subscription as follows :—

The One-Year Notes at 99.52 and interest, yielding 6 per cent.

The Two-Year Notes at 99.07 and interest, yielding 6 per cent.

Subscription books will be opened at the office of J. P. Morgan & Co. at 10 o'clock A.M., January 24, 1917, and will be closed at 10 o'clock A.M., January 31, 1917, or earlier, in their discretion.

The Right is reserved to reject any and all applications, and also, in any event, to award a smaller amount than applied for.

Amounts due on allotments will be payable at the office of J. P. Morgan & Co. in New York Funds, to their Order, and the date of payment will be given in the Notices of allotment.

Temporary Certificates will be delivered pending the preparation of the definite Notes.

J. P. MORGAN & CO.
FIRST NATIONAL BANK, New York City.
NATIONAL CITY COMPANY, New York City.
HARRIS TRUST & SAVINGS BANK, Chicago.
BROWN BROTHERS & CO.
WM. A. READ & CO.
J. & W. SELIGMAN & CO.
KIDDER, PEABODY & CO.
LEE, HIGGINSON & CO.
LAZARD FRERES.
KISSEL, KINNICUTT & CO.
WHITE, WELD & CO.
GUARANTY TRUST COMPANY OF NEW YORK.

Bankers Trust Company, New York City.
Farmers Loan & Trust Company, New York City.
Central Trust Company of Illinois, Chicago.
Halsey, Stuart & Co., Chicago.
Continental and Commercial Trust and Savings Bank, Chicago.
Marine National Bank, Buffalo.
Union Trust Company, Pittsburgh.
First & Old Detroit National Bank, Detroit.
New York, January 22, 1917.

THE GOVERNMENT OF THE
UNITED KINGDOM OF GREAT BRITAIN
AND IRELAND
to
BANKERS TRUST COMPANY

PLEDGE
dated February 1, 1917
Securing
$250,000,000
One-Year and Two-Year 5½ per cent. Secured Loan
Convertible Gold Notes

Interest payable August 1
and February 1.

New York City, February 1, 1917.

To Bankers Trust Company
New York City.

Dear Sirs:

The Government of the United Kingdom of Great Britain and Ireland (hereinafter termed the "Obligor") is about to issue and to sell its 5½ per cent. Secured Loan Convertible Gold Notes for the aggregate principal amount of $250,000,000, dated February 1, 1917, of which $100,000,000 principal amount are One-Year Notes maturing February 1, 1918, and $150,000,000 principal amount are Two-Year

Notes maturing February 1, 1919; such Notes (hereinafter referred to as the Notes) to be substantially in the form (the blanks therein being appropriately filled) marked Schedule A-1 hereto annexed, and to be authenticated by the certificate thereon executed by your Company. Pending the preparation of the definitive Notes, temporary Notes without coupons, substantially in said form, may be issued in any denomination and similarly authenticated. The Twenty-Year 5½ per cent. Bonds, into which such Notes may be converted as therein provided, are to be substantially in the forms (the blanks therein being appropriately filled) marked Schedule A-2 hereto annexed.

I. In order to secure the payment, principal and interest, of all the Notes of said issue at any time outstanding according to their tenor, and in consideration of the purchase and acceptance of such Notes by the original and subsequent takers and holders thereof, the Obligor hereby pledges with your Company certain bonds, stocks and other securities (hereinafter termed, collectively, "pledged securities") of the aggregate value of not less than $300,000,000 as follows:—the several issues of such securities which are or may be pledged, and the unit values at which such securities severally and respectively are or are to be pledged hereunder, being set forth in Schedule B hereto annexed—viz.:

> Group 1. Stocks bonds and other securities of American municipalities and corporations and the Canadian Pacific Railway Company, and bonds and other obligations (either as maker or guarantor) of the Government of the Dominion of Canada, the Colony of Newfoundland, and provinces of the Dominion of Canada, and bonds and other securities of approved Canadian municipalities: Aggregate value not less than $150,000,000.
>
> Group 2. Bonds and other obligations (either as maker or guarantor) of any or all of the several following Governments to wit: Argentina, Chile, Cuba, Commonwealth of Australia, Egypt, Japan, New Zealand, and Union of South Africa, and bonds and other obligations of approved railways in Argentina, and bonds and other obligations of the Grand

Trunk Railway Company of Canada, and approximately $25,000,000 value in bonds and other obligations of dividend-paying British railway companies: Aggregate value not less than $150,000,000.

Such pledge to your Company is in trust for the benefit of all present and future holders of the Notes, so that subject to the terms hereof the principal and interest of the notes shall be secured rateably by such pledge.

Coupons or warrants for interest or dividends maturing or payable on or prior to February 1, 1918, on any securities held by your Company under this writing, may be lodged at the office of Guaranty Trust Company of New York in London, England, or at such other agencies in London as your Company may elect.

II. In case at the time of the authentication by your Company of the Notes, the Obligor shall not have delivered to you all of the securities deliverable under Clause I. hereof, the Obligor will deposit temporarily with you, as part of the security hereunder, (1.) stocks, bonds or other securities that are listed upon the New York Stock Exchange and are approved by J. P. Morgan & Co. as acceptable for the purpose, of a value equal to the difference between $300,000,000 and the aggregate value of the securities that shall have been delivered under Clause I., and (2.) a sum in cash equal to five-sixths of the difference, if any, between $300,000,000 and the aggregate value of the securities delivered under Clause I. and the securities under this Clause II.

Thereafter from time to time upon delivery to your Company of any securities deliverable under Clause I. and not theretofore delivered, your Company either (*a*) will redeliver such temporarily deposited securities of an amount in value equal to the amount in value of the securities so delivered under Clause I., or (*b*) will repay such temporarily deposited cash of an amount equal to five-sixths of the value of the securities so delivered under Clause I.

III. From time to time, upon the written request of the Obligor and the written approval of J. P. Morgan & Co., your Company shall release any of the pledged securities, provided that contemporaneously there be substituted for the securities of either group so released, other securities of the same group of equal aggregate value.

IV. If at any time the pledged securities shall have depreciated in aggregate value either because of change in market price or in the rate of exchange, so that such aggregate value shall become less than 120 per cent. of the principal amount of the Notes at the time outstanding, the Obligor from time to time will deliver to your Company, as part of the trust estate, additional securities of one or both of the groups sufficient to bring the value of all the securities pledged to a sum exceeding by not less than twenty per cent. (20 per cent.) the principal amount of the Notes at the time outstanding, so that at all times such twenty per cent. (20 per cent.) excess value shall be maintained; provided, however, that if at the time of such depreciation the Trustee shall hold, as part of the security under this writing, any cash deposited in lieu of securities, then and in such case the Obligor shall not be required to pledge additional securities hereunder unless at the time the aggregate value of the pledged securities held by the Trustee shall have become less than 120 per cent. of the difference between the aggregate principal amount of the outstanding Notes and the amount of such cash, nor to pledge any additional securities except to an amount sufficient to increase the value of the pledged securities to the amount of 120 per cent. of said difference in amount.

V. For all purposes of Clause I. of this writing, the value of the pledged securities is to be computed upon the basis of the unit values respectively set forth in Schedule B, or such lower value respectively as J. P. Morgan & Co. shall certify to your Company in writing to be in their opinion the values of any units of such pledged securities at the time of the deposit thereof with your Company.

For the purposes of Clause II. of this writing, (1.) the value of the securities therein referred to as deliverable under Clause I. is to be computed upon the basis of the unit values thereof respectively set forth in Schedule B, or such lower values respectively as J. P. Morgan & Co. shall certify to your

Company in writing to be in their opinion the values of any units of such pledged securities at the time of the deposit thereof with your Company, and (2.) the value of the securities temporarily deposited shall be deemed to be such as J. P. Morgan & Co. shall certify to your Company in writing to be in their opinion the values respectively of such temporarily deposited securities at the time of the deposit thereof when computed upon the basis of the market value on the New York Stock Exchange.

For all purposes of Clause III. and Clause IV. of this writing the value at any time of pledged securities released and of securities substituted therefor and of additional securities pledged, respectively, shall be deemed to be such as J. P. Morgan & Co. shall certify to your Company in writing to be in their opinion the values of such substituted or released or additional securities, as the case may be, at the time of such substitution or release or pledge, as determined upon the following basis, viz. : (*a*) The value of such securities payable in currency of the United States, shall be the market value of the securities on the New York Stock Exchange, if quoted thereon, and, if not quoted thereon, the market value in the general securities market in New York ; (*b*) the value of such securities not payable in United States currency shall be the market value in London of the securities in pounds sterling, converted into dollars in the City of New York at the then exchange value of pounds in the New York market ; and (*c*) if any of the securities in the judgment of J. P. Morgan & Co. have no quoted market prices, the market value of such securities shall be taken to be such as J. P. Morgan & Co. shall fix for the purpose.

All determinations of value have been made and shall be made without including any amount for accrued interest on any of the securities valued.

VI. The security hereby constituted shall become enforcible in each and every of the following events of default by the Obligor (hereinafter termed " events of default "), viz. :—

(*a*) Default in the payment of the principal of any of the Notes.

(*b*) Default in the payment of any instalment of interest on any of the Notes, which default shall have continued for the period of thirty (30) days.

(*c*) Default in pledging hereunder additional securities to maintain the margin as provided in Clause IV. of this writing, which default shall have continued for the period of thirty (30) days after notice to the Obligor from your Company.

VII. Until the happening of an event of default, the Obligor shall be entitled (1.) to collect and to receive for its own account all interest, dividends and other income of the pledged securities, and accordingly at a reasonable time prior to the due date thereof to have delivered by your Company to the Obligor or upon its order all coupons and warrants for such interest, dividends and other income; and (2.) to exercise any voting rights appertaining to any of the pledged securities.

VIII. Upon the happening of an event of default your Company in its discretion may, and upon the request of the holders of twenty-five per cent. (25%) of the principal amount of the Notes at the time outstanding and upon being indemnified to its satisfaction your Company shall sell, collect and convert into money the pledged securities or any part thereof, and all rights of redemption thereof.

IX. At any sale, the pledged securities may be sold in one or more lots as in its discretion your Company shall determine. Any such sale shall be made at public auction in the City of New York, or in the City of London, or in part in one and in part in the other of said cities. The notice of sale shall contain a brief general description of the pledged securities to be sold, a statement of the time or times of each such sale, and a specification of the terms of sale as determined by your Company, and shall be sufficiently given if published once in each week for five successive calendar weeks prior to any such sale in two newspapers published in the Borough of Manhattan, City of New York, and in two newspapers published in the City of London.

From time to time, any such sale may be adjourned by your Company by announcement at the time and place appointed for such sale, or any such adjourned sale; and without further notice or publication, such sale may be made at the time and place to which the same shall have been so adjourned.

No Purchaser or any one claiming under him shall be bound to see to the application of the purchase money or to inquire as to the authorization or regularity of any such sale.

X. In case of any sale of any of the pledged securities by your Company under the power of sale above granted, the whole of the principal sums of the Notes, if not previously due, shall at once become due and payable.

XI. The avails of any sale shall be applied as follows :—

First, to the payment of the costs and expenses of such sale, and also a reasonable compensation to your Company, its agents, attorneys, and counsel, and of all taxes, expenses, liabilities and advances made or incurred by your Company in the care, administration or collection of any of the pledged securities.

Secondly, to the payment of the whole amount then owing and unpaid upon the Notes for principal and interest, including interest at the rate of five and one-half per cent. per annum on principal after maturity and on overdue coupons ; or in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon said Notes, then to the payment of such principal and interest ratably, without preference of principal over interest or of interest over principal.

Lastly, to the payment of the surplus, if any, to the Obligor.

XII. At any such sale, any holder or holders of any of the Notes (including your Company) may become the purchaser or purchasers of the pledged securities, without accountability except for the purchase price, whether the sale be made under the power of sale herein contained or pursuant to judicial proceedings.

XIII. From time to time, acting by its agents authorized in writing (of which authorization a duplicate shall be filed with your Company), the Obligor may sell any of the pledged securities, provided that the Obligor shall not be in default in the payment of the principal or interest of any of the Notes; and provided, further, that any default existing prior to such sale in the agreements of the Obligor contained in Clause IV. hereof, may and shall be remedied by the application of the proceeds of sale to the redemption of Notes as hereinafter provided. Such sales may be made in such manner and at such place, and whether publicly or privately, as the Obligor or its agents authorized as aforesaid may deem advisable. In case of any such sale, your Company shall release the securities so sold, upon receipt by your Company of the net proceeds of the sale as certified in writing to your Company by the Obligor or by J. P. Morgan & Co., the date of such release and delivery of such securities to be the date specified in said writing.

XIV. Any and all proceeds of any sale pursuant to the provisions of Clause XIII. hereof, shall be applied to the purchase or redemption of Notes as follows:—

Until the delivery to your Company by the Obligor of a request to redeem Notes by call as hereinafter provided, such moneys shall be applied by your Company to the payment of the purchase price of Notes secured hereby which shall be delivered to you by J. P. Morgan & Co., for cancellation. The Notes so purchased may be of either or both of the two maturities, indifferently. A writing signed by J. P. Morgan & Co., stating the amount of Notes, and the purchase price or prices thereof (which in no case shall exceed the then redemption prices), shall be warrant to your Company for paying to J. P. Morgan & Co., or upon their order, such purchase price or prices and for any other action taken by your Company on the faith of such writing.

If the Obligor shall deliver to your Company a written request to redeem Notes by call, specifying therein the date for such redemption which shall be not less than forty (40) days subsequent to the delivery of such request, your Company at the expense of the Obligor shall publish once in each week for five successive calendar weeks, in two newspapers published in the Borough of Manhattan, City of New York, a notice calling for the presentation and surrender at the office of your Company, on the date so specified (which date shall be not sooner than thirty days after the first publication) of the Notes to be redeemed bearing all unpaid coupons. In case less than all the outstanding Notes are so to be redeemed, the redemption moneys shall be apportioned and applied to the redemption of Notes of each of the two maturities, for aggregate principal amounts which in relative proportion shall correspond to the relative proportion of the two maturities at the time outstanding; and the notice shall specify, by reference to the serial numbers thereof, the Notes called for redemption of each of the two maturities, as determined by lot according to any method deemed proper by your Company and approved by J. P. Morgan & Co.

To the extent of any moneys applicable to the purpose at the time thereafter held by your Company, upon surrender of any such designated Note, bearing coupons as aforesaid, your Company shall receive the same and shall pay therefor the principal amount, the premium thereof payable on the designated redemption date, and the accrued interest thereon up to such redemption date.

To avoid partial redemption of any Note of a denomination greater than $1000, your Company in any drawing for redemption may apportion as nearly as practicable to the aggregate amount of Notes of each denomination of each of the two maturities, respectively, such part of the money available for the redemption of the Notes of each maturity as shall bear to the whole thereof the same proportion that the aggregate amount of Notes of each denomination of such maturity shall bear to the aggregate amount of all the Notes of such maturity then outstanding, and a separate drawing of the Notes of each denomination of each maturity, shall be made for such amounts as the money apportioned to such denomination shall suffice to pay at the redemption rates then respectively applicable thereto.

All Notes so redeemed or purchased forthwith shall be cancelled by your Company and be delivered to the Obligor.

XV. The right to enforce the security given by these presents for the benefit of the Notes, shall vest exclusively in your Company and its successors in the trust, and all action by your Company in such enforcement shall be for the rateable benefit of all of the Notes at the time outstanding. No holder of any Note or coupon shall bring any suit, action or other proceedings for the enforcement of such security.

XVI. Upon payment (or upon the making of provision for the payment by the deposit with your Company of the amount payable thereon) of the One-Year Notes at maturity, and at any time upon the payment or redemption of any of the Notes, and in every such case provided that the moneys paid or deposited shall not be the proceeds of the sale of pledged securities, and also at any time upon the retirement of any of the Notes through the conversion thereof into the Twenty-Year Bonds of the Obligor as provided in the Notes, your Company shall release and deliver according to the order of the Obligor such part of each class of the pledged securities then held by your Company as shall bear to the whole of such class so held, approximately the same proportion as the aggregate principal amount of the Notes so paid or redeemed or converted shall bear to the aggregate principal amount of the Notes outstanding immediately prior to such redemption or payment on conversion—the approximation of the proportion of the pledged securities to be released to be made by your Company in the exercise of its sole judgment.

For the purposes of this Clause XVI., the pledged securities of American municipalities collectively shall constitute a separate class; the pledged securities of American Corporations (including the Canadian Pacific Railway Company) collectively shall constitute a separate class; the pledged securities collectively of the Dominion of Canada shall constitute a separate class; the pledged securities collectively of the Colony of Newfoundland and each of the several provinces of the Dominion of Canada and each of the several municipalities of the Dominion of Canada shall constitute, respectively, separate classes; the pledged securities collectively of each of the several Governments specified in Group 2 of Class I. of this writing shall constitute, respectively, separate classes; the pledged securities of railways in the Argentina collectively shall constitute a separate class; the pledged securities of the Grand Trunk Railway Company of Canada collectively shall constitute a separate class and the pledged securities of British railway companies collectively shall constitute a separate class; provided, however, that all such withdrawals of securities of American corporations (including the Canadian Pacific Railway Company), or of Argentina railways, or of the Grand Trunk Railway Company of Canada, or of British railway companies, shall be such as are approved by J. P. Morgan & Co.

When all of the Notes, principal and interest, shall have been paid, or when provision for such payment shall have been made by the Obligor by depositing with your Company the amount payable to Noteholders, or when all of the Notes not so paid or provided for shall have been retired by conversion thereof as aforesaid, your Company, at the cost and expense of the Obligor, shall redeliver to the Obligor the pledged securities, together with proper instruments of assignment and transfer.

XVII. Any request or other instrument purporting to be signed on behalf of the Obligor for any of the purposes of this writing, including the authentication and delivery of the Notes, if verified by the countersignature of J. P. Morgan & Co., shall be authority to your Company for taking action pursuant to such request or other instrument.

All rights and powers of J. P. Morgan & Co., shall vest in the copartnership or firm doing business under such name and shall pass to and shall vest in the successors of such firm as from time to time constituted, doing business as such successor.

Any notice to the Obligor required to be given under this writing or by law, shall be sufficiently given if addressed "To the Secretary of the British Treasury, care of J. P. Morgan & Co.," and delivered by hand to any member of the firm of J. P. Morgan & Co., at their office in the City of New York.

XVIII. Your Company shall be under no duty to take notice of any default on the part of the Obligor in any of its agreements contained in the Notes or in this writing, or otherwise, unless it shall receive notice thereof and request to take action thereupon by a writing signed by persons shown to your Company's satisfaction to be the holders of ten per cent. of the principal amount of the Notes then outstanding; but nothing herein contained shall be deemed to limit or affect the right of your Company without notice or request from Noteholders to take action upon any default.

Any securities delivered hereunder may be retained by your Company in the form in which deposited until a default hereunder or until requested by the Obligor to have the same transferred.

XIX. In case your Company shall be in doubt in any instance as to the meaning of this instrument or its powers or duties thereunder, your Company may advise with legal Counsel selected by it and shall be protected in anything done or suffered by it in good faith in pursuance of the opinion of such Counsel.

FOR THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

SCHEDULE A-1.

[Form of Note.]

No............ $...........

THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

$250,000,000

FIVE AND ONE-HALF PER CENT. SECURED CONVERTIBLE LOAN.

One-Year Notes $100,000,000.

Two-Year Notes $150,000,000.

...........YEAR GOLD NOTE.

THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND (hereinafter termed "Obligor"), for value received, promises to pay to bearer the sum of Dollars on the first day of February, 19 , and to pay interest on such principal sum at the rate of five and one-half per centum (5½ per cent.) per annum, semi-annually, on the first day of August and the first day of February in each year, until such principal sum shall be paid, but only upon presentation and surrender of the coupons for such interest, hereto attached, as severally they mature. Such principal sum and the interest thereon will be paid without deduction for any British taxes, present or future, and, at the option of the holder, either at the office of J. P. Morgan & Co., in City of New York, State of New York, United States of America, in gold coin of the United States of America of the standard of weight and fineness existing February 1, 1917, or in the City of London, England, in sterling money at the fixed rate of $4·86½ to the pound.

The Notes of the Loan, for the aggregate principal sum of $250,000,000, are equally and rateably secured by the pledge with Bankers Trust Company, a corporation of the State of New York, of certain bonds, stocks and other securities pursuant to and upon the terms of an instrument in writing (hereinafter termed "pledge agreement") duly executed and delivered by the Obligor to the said Trust Company to which pledge agreement, held by said Trust Company, reference hereby is made.

The Notes of the Loan severally are subject to redemption prior to maturity at the office of said Trust Company, at the option of the Obligor, during the several periods prior to maturity and at the respective prices following, to wit:

The One-Year Notes maturing February 1, 1918, shall be subject to redemption as aforesaid on any day until and including January 31, 1918, at 101 per cent. of the principal sum, accrued interest to the date of any such redemption being also payable.

The Two-Year Notes maturing February 1, 1919, shall be subject to redemption as aforesaid on any day until and including January 31, 1918, at 102 per cent. of the principal sum, and thereafter on any day until and including January 31, 1919, at 101 per cent. of the principal sum, accrued interest to the date of any such redemption being also payable.

Notice of intention to redeem specifying the distinctive numbers of the Notes called for redemption, will be given by advertisement thereof in two newspapers published in said City of New York and in two newspapers published in the City of London, once in each week for five successive weeks, the first publication to be not less than thirty days prior to the date fixed for such redemption. If specified in any such notice, this Note shall become payable on the redemption date fixed in such notice; and after such redemption date, provided payment be made of the amount payable on this Note when presented pursuant to such notice, no interest will accrue hereon and any coupons for interest maturing after such date will be null and void.

Upon surrender for such purpose of this Note with all unmatured coupons attached, at any time prior to maturity (or, if called for earlier redemption, at any time until and including the date of such redemption), the Obligor without expense to the holder will issue in exchange, at the office of said Trust Company, a bond of the Obligor of like principal amount, payable February 1, 1937, and bearing interest at the rate of five and one-half per cent. (5½ per cent.) per annum, payable semi-annually on August 1 and February 1 in each year, and having annexed all unmatured interest coupons; such bond to be payable as to both principal and interest, at the option of the holder, either in the City of New York in gold coin of the United States of the standard of weight and fineness existing February 1, 1917, or in the City of London, England, in sterling money at the fixed rate of $4·86½ to the pound, and such payment of principal and interest at either such place of payment to be made without deduction for any British taxes, present or future; but no such conversion shall be required to be made unless the holder of this Note shall have given ten days previous notice of his election so to convert by a writing addressed to the Obligor and delivered to said Trust Company.

In case of the sale of any of the pledged securities in enforcement of said pledge agreement upon a default as specified therein, then and in such case the principal sum of this Note and of all other Notes of the Loan, if not previously due, will become forthwith due and payable.

The Notes of the Loan are issuable in denominations of $1000, $5000 and $10,000. Unless previously called for redemption, any Note of a denomination higher than $1000, with all unmatured coupons thereto attached, when surrendered for that purpose at the office of the said Trust Company, may be exchanged for Notes (bearing all unmatured coupons) of equal aggregate principal amount of lower denomination or denominations. For any such exchange, the Obligor may prescribe reasonable rules and regulations, and may require payment of a reasonable charge.

This Note shall not be entitled to the benefit of the said pledge agreement, nor be valid for any purpose, until authenticated by the certificate hereon duly executed by the said Trust Company or its successor in the trust under said pledge agreement.

Dated, February 1, 1917.

For the Government of the United
Kingdom of Great Britain and Ireland.
(Sd.) Cecil Spring Rice.

[FORM OF COUPON.]

No................ $..............

On the first day of , 191 (unless the Note below mentioned shall have been called for previous redemption) the Government of the United Kingdom of Great Britain and Ireland promises to pay to bearer, without deduction for British Taxes, present or future, dollars gold coin of the United States of America, at the office of J. P. Morgan & Co., in the City of New York, State of New York, United States of America, or, at the option of the holder, the equivalent of said sum in sterling money, at the fixed rate of $4·86½ to the pound, in the City of London, England, being six (6) months' interest on the ....Year Gold Note No...................of the 5½ per cent. Secured Convertible Loan of the said Government.

....

[FORM OF CERTIFICATE OF TRUST COMPANY.]

This Note is one of the Year Notes of the Loan within mentioned.

BANKERS TRUST COMPANY,
By..............................

The transaction recorded in these documents was duly carried out. The required loan was raised on notes given in the form appended to the pledge agreement. In due course in accordance with the terms of the offer expressly incorporated in the notes, notes to the value of $143,587,000 were converted into bonds which were issued in denominations of $100, $500 and $1000 with coupons attached in the form following.

BOND FOR $1000.

$1000 $1000

THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

Twenty-Year 5½ per cent. Coupon Gold Bond.
Payable February 1, 1937.

No. M 153012 No. M 153012

THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND (hereinafter termed "Obligor") for value received promises to pay to bearer, or, if this bond be registered, then to the registered holder hereof, the sum of ONE THOUSAND DOLLARS on the 1st day of February 1937 and to pay interest on such principal sum at the rate of five and one-half per cent. (5½ per cent.) per annum, semi-annually, on the 1st day of August and the 1st day of February in each year, until such principal sum shall be paid, but only upon presentation, and surrender of the coupons for such interest hereto attached as severally they mature.

Such principal sum and the interest thereon will be paid at the option of the holder, either in the City of New York, State of New York, United States of America, at the office or agency which will be maintained in the said City by the Obligor for the service of the bonds of this issue in gold coin of the United States of America of the standard of weight and fineness existing February 1917, or in the City of London, England, in sterling money at the fixed rate of $4·86½ to the pound.

Payment at either place aforesaid will be made without deduction from either such principal or interest for any British taxes, present or future. This bond will not be redeemed prior to the due date thereof above specified.

This bond may be registered in the name of the holder, but only as to the principal sum thereof, by presenting the same for such purpose to the Bond Registrar of the Obligor in the City of New York for notation of such registration hereon. After such registration no transfer shall be valid unless made by the registered owner in person or by his duly authorized attorney and similarly noted hereon, but transferability by delivery may be restored by transfer to bearer and like notation thereof hereon. Coupon bonds of this issue, upon surrender thereof with all unmatured coupons attached, to said Bond Registrar of the Obligor in the City of New York, in principal amount aggregating $1000 or multiples thereof, may be exchanged for a bond or bonds without coupons of authorized denominations, for an equal aggregate principal amount, registered in the name of the holder as to both principal and interest. Coupon bonds of this issue are to be in denominations of $1000, $500 and $100 and any coupon bonds at any time outstanding may be exchanged when surrendered for that purpose, with all unmatured coupons attached, for coupon bonds of equal principal amount of any other of said denominations. For any registration or exchange of bonds as provided herein, the Obligor may prescribe reasonable rules and regulations, and for any exchange of engraved bonds may require payment of a reasonable charge.

Dated February 1, 1917.

For the Government of the United Kingdom of
Great Britain and Ireland.

(Sgd.) GERALD CAMPBELL.

(Endorsement on Bond.)

As provided on the face of the bond, coupon bonds of this issue are exchangeable for an equal principal amount of coupon bonds of other denominations or of registered bonds, which registered bonds are in turn exchangeable for coupon bonds.

COUPON.

THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

On the First day of Feb. 1937.

$27·50

Promises to pay to Bearer, at the office or agency which for such purpose will be maintained by the Government in the City of New York, United States of America, TWENTY-SEVEN AND 50/100 DOLLARS, gold coin of the United States of America, or, at the option of the holder, in London, England, in sterling money at the fixed rate of $4·86½ to the pound, payment at either place being made without deduction for British taxes present or future being six months' interest on the Twenty-year 5½ per cent. Bond of the Government.

For the Government of the United Kingdom of
Great Britain and Ireland.
(Sgd.) JOHN BRADBURY,
Secretary to the Treasury.

No. M 153012
40

Now beginning with the Notes, what is the true inference as to the intention of the parties as to the proper law of the contract contained in them? They were issued in America, they were expressed in terms of American currency, they were to be paid on one option in America on a value estimated by reference to American coins. But there is the further fact that they were secured by a pledge agreement also made in America, performed in America by the deposit with an American company of securities on terms which appear irresistibly to give rights governed by American law as to maintaining margins of value, redemption, enforcement by sale. They contemplate a judicial sale which in my opinion can only mean a sale by orders of an American Court; and they finally stipulate that the company with which the securities are pledged shall be protected if it acts in accordance with the opinion of counsel selected by it, which must, I think, in this context mean American counsel advising on American law. I do not overlook that there is an option to be paid in England, that there is a clause stating that payment is to be made without deduction of British taxes, and in particular the weighty circumstance that the borrowers are the British Government. But it is to be noted that the obligation to pay in England is secured only by the American pledge agreement and that the provision as to British taxes is a provision which might well be inserted ex majori cautela in any contract under which a Government has to make payment. But taking all the circumstances into consideration I think that the irresistible inference is that the proper law of the contract is American law, meaning thereby in this contract the law of the State of New York. I come to this conclusion without attempting to answer the question put in argument, What would have been the result of the issue in America in 1917 if there had been expressed in the pledge agreement or in the Notes the term that the contract was to be governed by English law?

Now if the Notes were governed by American law how is it possible to avoid the conclusion that the bonds into which at the will of the holders they were convertible before maturity were intended to be governed by the same law? In substance the bonds are long term renewals, and I find it impossible to assume that the parties who on the hypothesis start with an American contract either in fact intended or in some way or another signified to each other the intention no longer to be bound by American law but for the future to substitute English law. In terms there is no substantial difference other than time between the obligation expressed in the Notes and in the bonds. There is the very material fact that the bonds are not secured by the pledge agreement, but I cannot regard this as countervailing the strong improbability that the holder of an American Note surrendered it in exchange for an English bond, the debtor and other terms remaining for this purpose the same. There are indeed expressions in the bond which bear an American complexion: but in themselves they

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are far from conclusive: and one must base the inference on the transaction viewed as a whole. It is, I think, unfortunate that the attention of the Courts below does not seem to have been directed to the importance of the Notes and the pledge agreement as bearing on the question in issue. I think their decision might have been different. I need only add that the question before us has to be determined as of the time that the bonds were exchanged for the Notes. The fact that they were negotiable and possibly negotiated in other countries does not affect the question. Having reached this conclusion in favour of American law as the proper law of the contract I need add but a few words. It is admitted that the effect of the Joint Resolution of Congress, dated June 5, 1933, had the statutory effect in New York State as well as in all the other States of the United States of requiring a bond expressed in the present form to be discharged upon payment dollar for dollar of the nominal amount. As this is so the suppliants who only found their petition of right upon their claim to be paid in America a larger sum than the nominal amount of the bond must fail: and it becomes unnecessary to consider the other points which came under discussion in the Courts below. I think it desirable to add, however, that as at present advised I agree with the construction placed upon the bond by the Court of Appeal applying English law, and that it would appear from recent decisions of the Supreme Court that the same conclusion would be reached by applying American law. It is not, however, necessary finally to decide this. For the above reasons I proposed the motion allowing the appeal and restoring the judgment of Branson J. which the House has already adopted.

LORD RUSSELL OF KILLOWEN. My Lords, I can state briefly, but I hope adequately, my reasons for having voted in favour of entering judgment for the Crown upon this petition of right.

Branson J. held (1.) that the proper law of the contract was the law of England; (2.) that the relevant clause in the contract provided for payment in gold coin, and not for payment of the value in currency of gold coin, in other words that what has been sometimes called the " Feist construction " did not apply to the clause ; (3.) that payment in gold coin in America had by American law become illegal and that therefore the obligation to pay in gold coin in America had become void ; (4.) with the result that there remained only the obligation to pay in London at the fixed rate of exchange calculated on the nominal amount of the bond.

The Court of Appeal agreed with the learned judge in holding that the proper law of the contract was the law of England, but they applied the " Feist construction " to the clause, holding that the contract was for payment of the value in currency of gold coin. Further they were of opinion that it was neither illegal by American law nor contrary to the public policy of America to make such payment.

I agree with the Court of Appeal that the clause should be construed as a contract to pay in the City of New York the value in currency of gold coin of the weight and fineness specified. The features which point to that construction are no doubt less numerous and less strong in the present case than in the Feist case. These gold clauses have, however, come under the review of judicial tribunals in many countries and the " Feist construction " has prevailed, in that they are generally regarded merely as clauses to protect one of the contracting parties against a depreciation of the currency. It would, I think, be regrettable if uniformity in this respect did not prevail, and a different construction should be applied, except in cases where the " Feist construction " is expressly excluded.

I differ, however, from the Court of Appeal as regards the proper law of the contract, for in my opinion the proper law of the contract is the law which prevails in the City of New York. Both Branson J. and the Court of Appeal would, I think, have been of this opinion too, had it not been for the fact that one of the contracting parties was the Crown. Their judgments on this point both proceed upon the view that because a contract cannot be enforced against a

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Sovereign unless he submits himself to the jurisdiction of some Court, and because a Sovereign will presumably not submit himself to the jurisdiction of a foreign Court, therefore the matter stands as if the parties had agreed to be bound by the jurisdiction and decision of the Courts of a particular country—namely, the country of the Sovereign. They both rely also upon certain dicta of Lord Romilly in *Smith* v. *Weguelin* (1) and Lord Selborne in *Goodwin* v. *Robarts*. (2)

The phrase " the proper law of a contract " is a phrase which I conceive bears the meaning attributed to it in Professor Dicey's r. 155—namely, " the law or laws by which the parties to a contract intended . . . . the contract to be governed ; or (in other words) the law or laws to which the parties intended . . . . to submit themselves." The intention must be the intention of both, not of one party alone. For this reason I feel great difficulty in assenting to the dicta referred to, or to the view that the fact of a Sovereign being a party to a contract establishes conclusively that the law of that Sovereign's country is the law which is to apply. It is an element of weight to be considered, but it is no more than that ; and in appraising its weight it must be borne in mind that to ascertain what rights and obligations arise under a contract is a matter quite distinct from the enforcement of those rights and obligations when ascertained. The fact (if it be the fact) that the rights and obligations under a contract can only be enforced against a Sovereign in the Courts of his own country, seems to me a fallacious basis for ascertaining the law by which those rights and obligations are to be ascertained. Thère is no inconsistency in the view that rights and obligations defined by the law of one country are only capable of enforcement in the Courts of another.

Let me now consider what law is applicable to this contract on the footing that, notwithstanding the fact that the Crown is a party, the parties may have intended that it should have been governed by some law other than the law of England. We have had placed at our disposal some material which was not, I think, brought to the attention of the Court of Appeal.

(1) L. R. 8 Eq. 198, 212–13. (2) 1 App. Cas. 476, 495.

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These dollar bonds did not initiate the transaction. The matter started with an offer by J. P. Morgan & Co. in the City of New York for subscription of $250,000,000, one-year and two-year 5½ per cent. Notes. This loan was being raised at a juncture during the war, when the United States of America (not yet a belligerent) was the country of all others to whose people applications for a large loan could be successfully addressed. The Notes were to be convertible into the dollar bonds, and were to be secured by pledge with the Bankers Trust Company, New York. The offer was stated to be made " subject to the approval by our counsel of necessary formalities." A copy of the pledge was produced. It takes the form of a letter written on behalf of the Government of the United Kingdom and addressed to the Bankers Trust Company, New York. It is quite obviously an American document and intended to be governed by American law. J. P. Morgan & Co. are given in many respects a controlling voice, such as powers of approval of securities to be temporarily deposited, of release of securities, and of certifying values. In the event of default a sale of the securities may take place either under the power of sale expressly conferred upon the Bankers Trust Company, or—I quote the document—" pursuant to judicial proceedings." This, I think, can only refer to judicial proceedings in New York. Any notice to the Government required to be given—again I quote from the document—" under this writing or by law" will be sufficiently given if addressed to the Secretary of the British Treasury, care of J. P. Morgan & Co., and delivered by hand to any member of that firm at their office in the City of New York. Here again the reference to law can, I think, only be a reference to the law prevailing in the City of New York. The last clause of the document provides that in case the Bankers Trust Company is in doubt in any instance as to the meaning of the instrument or the company's powers or duties thereunder—I quote once more—" your company may advise with legal counsel selected by it and shall be protected in anything done or suffered by it in good faith in pursuance of the opinion of such counsel." There can be no doubt that the Bankers Trust Company were to be protected by the advice given to them by New York lawyers advising them as to the effect of the instrument construed according to the law prevailing in the City of New York.

If then the rights and obligations of the respective parties in relation to these Notes were to be governed by that law it would naturally follow that, in the absence of some express provision to the contrary, the same law would apply to the dollar bonds which took their place. It was, however, contended that by some means when the Notes were exchanged for the bonds, English law came into play and applied to them; as the picturesque phrase ran—" the documents were repatriated." I can see no justification for this either on principle or in fact. Looking at the bonds, apart from any question of their pedigree, I would have been prepared to hold that the proper law of the contract was the law prevailing in the City of New York. The offer was made in New York and accepted in New York. The loan was a dollar loan. The bonds were registrable only in New York, and if registered were only transferable by registration there. The performance of the contract by the lender was complete when the bond was issued: the performance by the borrower (namely, payment of interest and repayment of capital) might if the lender wished take place in England, but prima facie the locus solutionis is where the contract was made: and I agree with the views of Branson J. and the Court of Appeal (which are borne out by the frame of the interest coupons) that in this case the primary place of performance was New York with an option in the lender to require performance in England. But if any doubt existed as to the proper law of the dollar bonds contract standing alone, it would in my opinion be removed by a consideration of the fact that they were issued in replacement of the secured Notes.

What then was the *obligation* of the Government when on February 1, 1937, the principal sum became payable in New York? I emphasize the word " obligation " because some embarrassment and confusion have been caused by the form of the present proceedings. The petition of right claims to have the suppliants' rights under the bonds ascertained and declared, and compensation for the damages which they have sustained by reason of the Crown having repudiated any obligation to pay in New York anything in respect of interest on the bonds beyond a dollar lawful currency of the United States of America for each nominal dollar of obligation. This repudiation was based upon the contention that the law prevailing in New York City applied to the contract and upon the provisions of a Joint Resolution in Congress No. 10 of 73rd Congress. The petition of right does not in terms refer to the repayment of principal. The parties, however, seem to have agreed that the Court should determine the true meaning of the contract and declare the *rights* of a bondholder who presented his coupons or his bond for payment in New York. Again I emphasize the word "rights," and for this reason—the Court of Appeal have held that the Joint Resolution, though it enables the Crown to discharge its obligations under the Bonds, whether for payment of interest or principal, by dollar for dollar payments, does not prohibit the Crown from making apparently by way of gift the larger payment which results from the Feist construction. The declaration which they made is (as to the relevant part) that upon the true construction of the Bond in the events which have happened the bearer is *entitled to receive in New York* the larger payment.

Such a declaration cannot in my opinion stand consistently with the legislative force of the Joint Resolution, which provides that such a provision as is under consideration in this case is against public policy, and shall (not may) be discharged upon payment dollar for dollar in any currency which at the time of payment is legal tender for public and private debts. In the face of this legislation, in force in the City of New York, it is in my opinion impossible to declare that the suppliant is "entitled to receive in the City of New York" the larger payment. No such right could be enforced there.

My Lords, we were not asked merely to decide the construction of the bond as a matter of academic interest. We were asked to decide what were the rights of the

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bondholders who required to be paid in New York. Those rights are the rights which the Crown has always been willing to admit, and are not the rights which the suppliants claimed.

The gold clause, designed as a protection against depreciation of the currency, has in this case been defeated in its object by the special legislative provisions of the Joint Resolution.

In these circumstances the suppliants were entitled to no relief on their petition of right and judgment was therefore entered for the Crown, though not upon the grounds which had influenced Branson J. in arriving at the same result.

LORD MAUGHAM. My Lords, the decision of the petition of right in this case has raised several important questions in reference to certain dollar bonds issued in New York by the Government of the United Kingdom of Great Britain and Ireland during the Great War. The bonds, according to the usual commercial term, are gold bonds, that is they contain the following clause: "Such principal sum and the interest thereon will be paid at the option of the holder, either in the City of New York, State of New York, United States of America, at the office or agency which will be maintained in the said City by the Obligor for the service of the Bonds of this issue in gold coin of the United States of America of the standard of weight and fineness existing February, 1917, or in the City of London, England, in sterling money at the fixed rate of $4·86½ to the pound." There is a similar provision on the interest coupons.

The petition of right, which is in that respect in a very unusual form, prays that His Majesty will cause the suppliants' rights under the bonds held by them "to be ascertained and declared and your suppliants to be reimbursed and compensated for the damages so sustained by them as aforesaid." Before your Lordships no question was raised as to the right of the suppliants if they exercised their option to be paid in the City of London. The order of the Court of Appeal in that event gives the suppliants a right to require such a sum in sterling calculated at the rate of 4·86½ dollars to the pound sterling as is equivalent to the nominal amount of each payment.

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But the Attorney-General as appellant, while consenting to the application to have the rights of the suppliants declared, has attacked the other branch of the order—namely, the declaration that the suppliants are entitled in the City of New York to receive by way of principal and interest " such a sum in the money of account of the United States of America as represents the gold value in New York of the nominal amount of each payment such gold value to be ascertained in accordance with the standard of weight and fineness existing on 1st February, 1917, and that accordingly every ' dollar ' comprised in the nominal amount of each such payment ought to be treated as representing the price in New York aforesaid in the money of account of the United States of America (calculated at the due date of payment) of 25·8 grains of gold of the standard of fineness prescribed by the law of the United States of America existing on the 1st February, 1917," with a further consequential statement which I need not set out as to any fraction of a " dollar " comprised in the nominal amount which might be due. My Lords, the difficulties arise by reason of a change in the currency of the United States since the bonds were issued. At that date gold coin, and what was treated as its equivalent, gold certificates which entitled the holder to gold coin, were in circulation. Ever since the year 1870, or thereabouts, nearly all important obligations of the nature of bonds and mortgages in the United States have contained a gold clause, the result of which, according to the legal tender decisions (so called), was that although paper money, commonly called greenbacks, were legal tender in payment of ordinary debts, that did not apply to obligations containing a gold clause. Such clauses according to the decision of the Supreme Court of the United States in *Norman* v. *Baltimore and Ohio Railroad Co.* (1) " were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed."

The currency position was, however, radically altered by a

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(1) 294 U. S. 240.

Joint Resolution of Congress passed on June 5, 1933, which is admitted to have the force of law in the United States. It recited that " the holding of and dealing in gold affects the public interest . . . . that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States or in an amount in money of the United States measured thereby " are inconsistent with the declared policy of Congress. It then provided (amongst other things), that " every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy " . . . . and that " every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

It should be added that gold coin had already been withdrawn from circulation, that Congress had already authorized the prohibition of the exportation of gold coin and the placing of restrictions upon transactions in foreign exchange, and that there were a number of executive orders and regulations on those subjects.

The validity of the Joint Resolution was at once challenged in two cases. The first, *Norman* v. *Baltimore and Ohio Railroad Co.* (1) raised the question as to the validity of the Joint Resolution with respect to the gold clauses of private contracts for the payment of money. The second case, decided by the Supreme Court on the same day as *Norman's* case (1) (February 18, 1935), *Perry* v. *United States* (2), presented questions as to the right of the plaintiff as the owner of a bond issued by the United States Government containing a gold clause, the bond being one of the Liberty Loans issued by the Government in 1918. In *Norman's*

(1) 294 U. S. 240.

(2) Ibid. 330.

case (1) the Supreme Court decided that the Joint Resolution was constitutional and that the bondholder, notwithstanding the gold clause, was entitled to no more than payment in money constituting legal tender dollar for dollar of the principal of each bond.

In *Perry's* case (2) the Supreme Court held that the Joint Resolution went beyond the power of Congress in so far as it attempted to override the obligations of the Government of the United States. It then went on to deal with the question of the damages suffered by the refusal of the Government to pay more than dollar for dollar. Chief Justice Hughes in delivering the opinion of the Court pointed out that it was inadmissible to assume that the plaintiff, suing for damages which he alleged he had sustained by the alleged breach of a gold bond, "was entitled to obtain gold for recourse to foreign markets or for dealings in foreign exchange or for other purposes contrary to the control over gold coin which the Congress had the power to exert, and had exerted, in its monetary regulation. . . . . The discontinuance of gold payments and the establishment of legal tender currency on a standard unit of value with which 'all forms of money' of the United States were to be 'maintained at a parity' had a controlling influence upon the domestic economy. It was adjusted to the new basis. A free domestic market for gold was non-existent." In view of these facts the Supreme Court held by a majority that a holder of a Liberty Bond issued by the United States Government had not proved that he had suffered any loss whatever by the refusal to comply with the terms of the gold clause, that the plaintiff had therefore failed to show a cause of action for actual damages, and, since the Court of Claims from which the appeal had come had no authority to entertain an action for nominal damages, the Supreme Court decided that the bondholder was not "entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond."

My Lords, *Perry's* case (2) cannot, in the view I take of

(1) 294 U. S. 240.

(2) Ibid. 330.

this case, be very relevant to the questions raised by the appeal, because it is admitted that the Joint Resolution applies to bonds or other obligations issued by any foreign Government and therefore applies to the dollar bonds on which the petition of right is based if and so far as the law of the United States is applicable to the matter. If the suppliants were to present their bonds at the office of J. P. Morgan & Co. in the City of New York it seems clear that the suppliants would not be entitled to receive anything more than the amount in legal tender currency of the face amounts of the bonds. If I correctly understand the argument for the suppliants it is that the law of England applies to their bonds even in regard to the presentation of the same for payment in the City of New York, and that they are entitled to recover in this country substantial damages in the event of the refusal (as threatened) of the Government of Great Britain to pay in New York City anything more than dollar for dollar pursuant to the Joint Resolution. I agree with the observations which have fallen from my noble and learned friend Lord Russell of Killowen in regard to the declaration made by the Court of Appeal.

My Lords, as I have indicated, questions of difficulty are raised by the petition; but it is not in dispute that if the proper law of the contract, using that phrase in the sense in which it is used in Dicey's Conflict of Laws, is the law of the State of New York then the Joint Resolution will apply and the petition of right must be dismissed. Both Branson J. and the Court of Appeal were led to the view that the proper law was that of England for the reason that the loan was one contracted by a Sovereign and that the ordinary criteria were inapplicable. In that respect both Courts thought they were bound to follow the authority of a dictum pronounced by Lord Romilly in *Smith* v. *Weguelin* (1) and repeated with approval by Lord Selborne in *Goodwin* v. *Robarts*. (2) The dictum seems not to have found its way into any of the English works of authority on Private International Law, and it has never been argued or considered by any of our

(1) L. R. 8 Eq. 198, 212, 213.

(2) 1 App. Cas. 476, 495.

Courts in any case where the accuracy of the dictum called for decision. The matter has been elaborately argued in this House, and in my opinion it has been clearly shown that the dictum, if it purports to enunciate a general rule, is far too widely expressed.

My Lords, it should be noted in the first place that in 1869, when *Smith* v. *Weguelin* (1) was decided, the rule that the interpretation of a contract and the rights and obligations under it of the parties thereto are to be determined by the law or laws to which the parties intended or may fairly be presumed to have intended to submit themselves (Dicey, rr. 155 and 161) had not been authoritatively settled. It is true that *Lloyd* v. *Guibert* (2) had been decided in the Exchequer Chamber, and that in a case arising on a contract of affreightment the rule had been laid down in clear terms; but that case was not cited in *Smith* v. *Weguelin*, (1) and no trace of it is to be found in the elaborate report of the arguments of counsel, or in the judgment. Mr. Jessel Q.C. for the plaintiff relied on the doctrine laid down in Story's Conflict of Laws, 6th ed., ss. 549, 550, that the lex rei sitae should be applied, and that since, as he argued, the loan was an English contract, contracted in England with English people and the repayment was to be made in England, the law of England was applicable. Sir Roundell Palmer, apart from the question of jurisdiction, met the contention on the part of the plaintiff by asserting that the material contract on which the action turned was clearly a Peruvian contract entered into in Peru before the issue of the bonds between Peruvians and according to the law of Peru; and this was the view taken by the learned judge.

Secondly, it is to be observed that the bonds of the Peruvian Government were issued both in London and in Belgium. In such a case it is easy to approve the conclusion that the contracts cannot vary "according to the domicil of the subscriber to the loan." In *Goodwin* v. *Robarts* (3) the Russian Government loan was issued in London and Paris and the Austro-Hungarian Government issued about the same time a Hungarian loan, as regards which the scrip and all the documents connected with it were almost identically in the same form. The only question was whether the scrip which promised to give the bearer a bond for the amount paid was a negotiable instrument. It was admitted that the bonds when issued would be negotiable. Nothing was said in the arguments or in the speeches as to the now accepted general rule for ascertaining the proper law of the contract.

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(1) L. R. 8 Eq. 198, 212, 213.
(2) L. R. 1 Q. B. 115.
(3) 1 App. Cas. 476.

My Lords, I think we are bound to come to the conclusion that in the case of a Government loan as in the case of any other contract, the law of the contract must depend upon the intention of the parties to be drawn from all the circumstances of the case. The reasons given by my noble and learned friend Lord Atkin show I think beyond doubt that the mere fact that a Government is a party to a contract is not decisive as to the proper law of the contract. I will only add that there have been systems of law according to which contracts for payment of interest were illegal, and perhaps there are still such systems. It would be indeed strange if the proper law of the contract involved in an issue of bonds by a foreign Government where such a law prevails were the law of that country. Moreover, there are sovereign powers where in substance there is no systematized law whatsoever. In such a case there would be strong reasons for holding that both parties to the contract intended to submit themselves to the law of the country where the money lent was to be repaid. On the other hand I accede to the view that where a foreign loan is being negotiated by a highly civilized Government considerable weight should be given to the circumstance that the Sovereign State is the borrower, and some but not great weight to the fact that such a borrower cannot be sued in any foreign Court without its consent. To my mind this fact is not decisive, because usually a Government cannot be sued in its own domestic Court without its consent. It is true that such consent can not infrequently be obtained; but except by consent there is generally no means of enforcing the judgment. The truth I think is that the lender does not contemplate any such proceedings, and lends in reliance on the credit of the foreign Government.

My Lords, in my opinion the circumstances under which the loan was issued as well as the terms of the offer, the letter of pledge of February 1, 1917, addressed from New York City to the Bankers Trust Company of that City offering convertible gold notes for subscription, the notes themselves, as well as the forms of the bonds have to be considered in coming to a conclusion as to whether the proper law of the contract embodied in the bonds is that of the State of New York or that of England. In my view something turns upon the War which had so greatly affected the credit of the great European Powers and had resulted in the British Government being glad to borrow at a rate unknown in living memory—namely, 5½ per cent. Nor is the position of the United States in relation to the War wholly immaterial. For many months their Government had been greatly concerned with the German plan of ruthless submarine warfare. The *Lusitania* had been sunk on May 7, 1915, and a minatory note from President Wilson had followed. The sinking of ships by submarines continued. On January 31, 1917, Germany issued a note containing an announcement of unrestricted submarine warfare to take place in the waters surrounding the British Isles, France and Italy. In this area ships whether belligerent or neutral were to be sunk at sight. On February 3, Count von Bernstorff was given his passports and the American Ambassador at Berlin was directed to sail for home. War was then only a matter of days. On April 2, after it had become clear that Germany was actively carrying out her threat a special Session of Congress was held, and within four days the United States and Germany were officially at war.

I have mentioned these historical facts because they show that when the $250,000,000 loan was being issued in New York in the form of secured Notes, there was an extreme probability that the United States in the course of a few weeks or at any rate before the end of the year would enter upon the War and thus become an ally of the United Kingdom;

and this explains the curious nature of the loan, the short term secured scrip with an option to convert into long term bonds. Nor was there at that time any existing ally of this country who could render financial assistance; Great Britain was borrowing largely for the purpose of financing her European allies. It was out of the question to obtain any substantial loan in any country except the United States.

I proceed to consider the terms of the relevant documents, all of which, except the offer, bore date February 1, 1917, though some of them were doubtless signed or executed a few days before that date. The offer was dated at the foot "New York, January 22, 1917" and purported to be signed first by J. P. Morgan & Co. and beneath that well known name those of twenty other eminent United States bankers or trust companies. It was headed (beneath the amount $250,000,000) with the words "United Kingdom of Great Britain and Ireland one-year and two-year 5½ per cent. secured loan convertible gold notes." The dates when interest and principal were payable followed, and then the line "Principal and interest payable at the office of J. P. Morgan & Co." There followed the sentence as to the right to convert:—

"Convertible upon notice, at the option of the holder, at any time before maturity, or (if called for earlier redemption) at any time until and including the date of such redemption, into twenty-year 5½ per cent. bonds of the United Kingdom of Great Britain and Ireland, payable February 1, 1937, and not subject to prior redemption."

"Principal and interest of the notes, and of the bonds into which they may be converted, is to be payable, without deduction for British taxes, present or future, in New York in United States gold coin or, at the option of the holder, in London in sterling at the fixed rate of $4·86½ to the pound."

I pause to observe that these provisions, and particularly the fact that notes and bonds are included in the same sentence as to mode and places of payment, point strongly to the conclusion that the law of the contract must be the same both for the Notes (which might never be converted) and for the bonds. I should add that the reference to freedom from

British taxes might have been thought desirable having regard to the option to require payment in London.

After a provision as to redemption, the document continued: "The notes are to be secured by pledge with Bankers Trust Company, New York, under a pledge agreement executed by the Government, of securities approved by J. P. Morgan & Co., of an aggregate value of not less than $300,000,000 calculated on the basis of the then prevailing markets, sterling securities being valued in dollars at the prevailing rate of exchange." There followed descriptions of the securities to be pledged and a provision that pending the arrival and deposit of definite securities as described, the Government was "to deposit temporarily with the Trust Company either approved New York Stock Exchange collateral or cash." There were provisions to meet the case of depreciation in value, and for the right of the Government to sell for cash any of the pledged securities, the proceeds of sale to be applied to the retirement of notes by purchase or by redemption by lot, and also for a substitution of other securities with the sentence "all substitutions, withdrawals and valuations of securities are to be approved by J. P. Morgan & Co." Then came the words: "This offering is made subject to the approval of our counsel of necessary formalities. We offer the above notes for subscription as follows:—The one-year notes at 99·52 and interest, yielding 6 per cent. The two-year notes at 99·07 and interest, yielding 6 per cent. Subscription books will be opened at the office of J. P. Morgan & Co. at 10 o'clock A.M., January 24, 1917, and will be closed at 10 o'clock A.M., January 31, 1917, or earlier in their discretion. . . . . Amounts due on allotments will be payable at the office of J. P. Morgan & Co. in New York Funds, to their order, and the date of payment will be given in the notices of allotment."

The above offer was made by J. P. Morgan and the group of bankers and trust companies to the public. The pledge of securities was effected by a letter dated "New York City, 1st February, 1917" signed by the British Ambassador to the United States for the Government and addressed to

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"Bankers Trust Company, New York City." It began thus: "Dear Sirs, The Government of the United Kingdom of Great Britain and Ireland (hereinafter termed the Obligor) is about to issue and to sell its 5½ per cent. Secured Loan Convertible Gold Notes for the aggregate principal amount of $250,000,000. Dated 1st February, 1917," and a description followed of amounts and dates of maturity. The notes were to be in the form of Schedule A1 and to be authenticated by the certificate thereon executed by the Bankers Trust Company. The bonds were to be substantially in the forms in the Schedule marked A2. There followed nineteen clauses containing the terms of the pledge of securities. There can be no doubt that in form it is an American document, providing for an effective pledge according to American law of the pledged securities placed in the hands of a trust company of New York City, providing in case of default for the sale by that trust company of the pledged securities, and for the application of what are termed "the avails of the sale" in payment first of costs and expenses, then of the whole amount owing upon the Notes for principal and interest, and lastly in payment of the surplus if any to the Obligor. Clause 12 contains a provision that any Note holder, including the Bankers Trust Company, may become the purchaser of the pledged securities, without accountability except for the purchase price, "whether the sale be made under the power of sale herein contained or pursuant to judicial proceedings." Notice to redeem the Notes was to be given by advertisements for five successive weeks in two newspapers published in New York City. The right to enforce the security was to vest exclusively in the trust company. Notices to the Obligor were to be sufficiently given if addressed "to the Secretary of the British Treasury, care of J. P. Morgan & Co." and delivered by hand to any member of that firm at their office in the City of New York. The final clause provided that the trust company, if in doubt as to the meaning of the instrument or their powers or duties thereunder might "advise with legal counsel selected by it and shall be protected in anything done or suffered by it in good faith in pursuance of the opinion of such counsel." My Lords, I do not think it can be doubted that the British Government, as well as the trust company and the lenders, intended that the law of New York should apply to this pledge in all respects, and that the Government by the letter agreed that their property so pledged should be free from the immunity ordinarily applicable to the property of a foreign Sovereign to the extent necessary for making the pledge effective.

It does not necessarily follow that the law of the contract in other respects might not be the law of England, but that view would seem to impute an improbable intention to the parties. So far as the Notes were concerned it is plain that the subscribers were not being asked to rely primarily, if at all, on the credit of the Government of the United Kingdom. Securities to the value of not less than $300,000,000 were being placed in the hands and under the control of the Bankers Trust Company to secure Notes to the value of $250,000,000 and it is to be remarked that provision was made for the possible event of the pledged securities depreciating in value either because of change in market price or because of change in the rate of exchange between London and New York, so that the aggregate value should become less than 120 per cent. of the principal amount of the Notes for the time being outstanding. Moreover there is nothing whatever in the Notes themselves, unless it be the circumstance that the promise to pay is a promise by the Government of the United Kingdom, which tends to support the view that the intention of the obligation was that it should be governed by the law of England.

After the United States had declared war, notes to the value of $143,587,000 were exchanged into bonds of three denominations with coupons attached. This was in effect a loan by citizens of the United States to an allied Power to enable it effectively to carry on the War. There is nothing in the form of the bonds, which will be found set out in full in the speech of the noble Lord on the Woolsack, to indicate that the proper law of the contract was not the same as in the case of the Notes. On the contrary the provisions for registration in the City of New York, and for transfer after such registration, seem to me to suggest that the bond is an American bond subject to the law of the State of New York.

My Lords, having reached the opinion that the question is one of presumed intention, I am, I think, fully justified on a consideration of the documents themselves read in the light of the surrounding circumstances, not omitting the fact that the borrower was the Government of the United Kingdom, in concluding, first, that the intention of all parties to the contract of loan effected by the offer and acceptance of the secured Notes was that it should be governed by the law of New York, and secondly, that it is impossible to come to the conclusion that the proper law of the contract embodied in the bonds was not the same law as that which governed the issue and acceptance of the Notes. It follows, therefore, that the law of New York State applies to the bonds, and that, if the New York option is exercised, the obligation of the Government is simply to pay that which in New York it is liable to pay in respect of the bonds, that is dollar for dollar, pursuant to the Joint Resolution.

These, my Lords, are the reasons which led me to vote in favour of the motion proposed by the noble Lord on the Woolsack; and I will only add that I am by no means clear that Branson J. and the Court of Appeal would not have come to the same conclusion had the facts been fully before them and had they regarded themselves as free to regard the dicta of Lord Romilly and of Lord Selborne as requiring the qualifications referred to above and in the speeches of the noble Lords who have preceded me.

LORD ROCHE. My Lords, I have had the advantage of reading in advance the opinions of the noble Lords which have just been delivered and there is little that I need add in expressing my concurrence in their reasoning.

As to the construction of the payment clause: I feel no doubt that it should by English law receive the same construction as was given to a similar clause in *Feist's* case. (1)

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(1) [1934] A. C. 161.

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As to the proper law of the contract: I confess that I have felt serious doubts during the course of the argument as to the true conclusion to be reached. The principles stated by Lord Romilly and Lord Selborne, though of course they do not constitute any absolute rules of law, are based upon considerations of very great weight and have stood unchallenged for so long a time that I have hesitated before differing from the Court of Appeal and Branson J. as to their effect upon the present case. But though I regard them as still generally applicable to most transactions of the character of the transaction now in question, yet this transaction was of a very exceptional character. At the time the Notes were issued—and I agree that it would be wrong to regard the issue of the Notes and of the bonds otherwise than as one transaction—it was natural that His Majesty's Government in making resort to a great and still neutral financial market in the United States of America should have clothed the transaction with both the appearance and the reality of a transaction domiciled so to speak in New York. It is needless that I should again call attention to the clauses in the documents of this import. But in English law a transaction may be regulated in general by the law of one country although as to parts of that transaction which are to be performed in another country the law of that other country may be the law applicable: *Chatenay* v. *Brazilian Submarine Telegraph Co.* (1) The question is, Can that situation be regarded as the situation here? On the whole I think it cannot be so regarded. The offer of January 22, 1917, contained this sentence: "This offering is made subject to approval by our counsel of necessary formalities." By the letter to the Bankers Trust Company, dated February 1, 1917, there was entrusted to legal counsel—which phrase meant in this document as in the offer counsel in New York—the power of decision upon amongst other things the meaning of the instrument in question. Stipulations of this nature are properly deemed to be of the greatest weight in the determination of questions as to the proper law of contracts.

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(1) [1891] 1 Q. B. 79.

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As a rule, and this case is no exception, the Courts and lawyers of any country or locality are taken to be intended to apply their own native law to the matter submitted to them for decision or advice. The letter of February 1 in effect provides for the decision under the law of New York of any doubtful matter, including any matter of construction. Such a stipulation on the subject of construction goes to the heart of the question of what is the proper law of the contract. Being satisfied that the law to regulate the Note part of the transaction was intended to be the law of the State of New York and thinking that it is impossible to distinguish the various stages of this loan transaction one from another in respect of their proper law, I am impelled to the conclusion that the law of New York was intended to apply throughout such transaction. The Joint Resolution of Congress therefore operates to defeat the suppliant's claims and the Crown is entitled to judgment.

LORD ATKIN. My Lords, I am authorized by my noble and learned friend Lord Macmillan to say that he concurs in the opinions which have been read.

Appeal allowed.

Solicitor for Crown: *Treasury Solicitor.*
Solicitors for respondents: *Allen & Overy.*

lied. DABHOLKAR v. THE KING.
[1948] A. C. 221

[HOUSE OF LORDS.]

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March 8, 9; April 22.

AND

DIRECTOR OF PUBLIC PROSECUTIONS . . . . RESPONDENT.

Criminal law—Manslaughter—Dangerous driving of motor car—Direction to jury—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 11—*Road Traffic Act,* 1934 (24 & 25 *Geo.* 5, *c.* 50), *s.* 34.

Where a person is indicted for manslaughter for having, while driving a motor car, unlawfully killed a man, the judge, in directing the jury, should in the first instance tell them that the facts must be such that in their opinion the negligence of the accused went beyond a mere matter of compensation between subjects and showed such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment; he should then explain that such degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving; and further he should indicate the conditions under which they may acquit the accused of manslaughter and convict him of dangerous driving. A direction that all the jury have to consider is whether death was caused by dangerous driving within s. 11 of the Road Traffic Act, 1930, and no more, is a misdirection.

Rex v. *Bateman* (1925) 19 Cr. App. R. 8 applied.

APPEAL from the Court of Criminal Appeal dismissing an appeal against conviction (reported sub nom. *Rex* v. *Andrews.* (1))

The appellant, Wilfred Andrews, was convicted at Leeds Assizes, before du Parcq J., of the manslaughter of one William Burton Craven through the dangerous driving of a motor car, and was sentenced to fifteen months' imprisonment and disqualified for life from holding a driving licence.

In the course of his summing up du Parcq J. said: "If a man is doing an unlawful act—if he is doing something which the law says that he must not do, and, because he is doing it,

(1) [1937] W. N. 69.

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* *Present:* LORD ATKIN, VISCOUNT FINLAY, LORD THANKERTON, LORD WRIGHT, and LORD ROCHE.

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he kills somebody, then he is guilty not only of that unlawful act, but of manslaughter. He has killed somebody in the course of doing, and because he was doing, an unlawful thing . . . . If he is driving [a motor car] recklessly he commits an offence whether he kills anybody or whether he does not, but if because he is driving recklessly somebody is killed, then he is guilty of the offence of manslaughter . . . . I think I ought to tell you this, that if you thought that although he drove recklessly, and although he drove at a speed or in a manner dangerous to the public within the words of [s. 11 of the Road Traffic Act, 1930 (1)] but that it was not because of that that this man was killed, the law would entitle you to convict him not of manslaughter but of dangerous driving. But in this case I am bound to tell you that if you think that he was driving recklessly and in a dangerous manner within the meaning of these words, and it was because of that that Mr. Craven was killed, then it is your bounden duty to convict him of manslaughter."

In his grounds of appeal the appellant said that the judge misdirected the jury (1.) in telling them that if the appellant was driving recklessly within the meaning of s. 11 of the Road Traffic Act, 1930, and because he was doing so someone was killed, the appellant was guilty of manslaughter; (2.) in telling them that if they thought that if the appellant was driving recklessly and in a manner dangerous within the meaning of s. 11 and it was because of that that Craven was killed, it was their bounden duty to convict the appellant of manslaughter; (3.) in failing to tell them that unless the appellant had been proved guilty of negligence causing the death, and of such negligence as went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment, they should not find him guilty of manslaughter; (4.) in failing to tell them that if the appellant was merely proved guilty of reckless or dangerous driving as defined by s. 11 of the Road Traffic Act, 1930, and by such reckless or dangerous driving to have caused the death of someone they should not find him guilty of manslaughter.

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(1) Road Traffic Act, 1930, s. 11, sub-s. 1: "If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable [to fine or imprisonment]."

Sect. 21 makes provision for the giving of notice to persons whom it is intended to prosecute under (inter alia) s. 11.

Road Traffic Act, 1934, s. 34: "Upon the trial of a person who is indicted for manslaughter in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under section eleven of the principal Act (which relates to reckless or dangerous driving) to find him guilty of that offence, whether or not the requirements of section twenty-one of the principal Act (which relates to notice of prosecutions) have been satisfied as respects that offence."

The Court of Criminal Appeal having dismissed the appeal, the Attorney-General certified that the decision involved a point of law of exceptional public interest and that in his opinion it was desirable in the public interest that a further appeal should be brought. Pursuant to that certificate Andrews appealed to this House.

Russell Vick K.C. and *G. S. Waller* for the appellant. If du Parcq J. was correct in directing the jury that if the accused person had done anything that was expressly forbidden by statute and by so doing had caused or accelerated the death of another, he would be guilty of manslaughter, it follows that if a motorist drives his car without due care and has the misfortune to cause the death of a person he would be guilty of manslaughter. Such a proposition is much too wide and cannot be supported. The statements in the older writers—Hale's Pleas of the Crown, vol. 1, p. 475; Foster's Crown Cases, p. 258, and East's Pleas of the Crown, vol. 1, p. 219, go much beyond what more recently has been held to constitute the offence of manslaughter. In *Reg.* v. *Franklin* (1) it was held that the mere fact that a person has committed a civil wrong against another ought not to be used as an incident which is a necessary step in a criminal

(1) (1883) 15 Cox C. C. 163.

case, apart from the question of criminal intention. There a man wrongfully took a box from a refreshment stall on a pier and wantonly threw it into the sea, thereby unintentionally striking and causing the death of a bather. It was decided that these facts were not per se sufficient to constitute the offence of manslaughter. It is always a question for the jury to say whether or not the degree of negligence by which death has been caused constitutes manslaughter. To tell the jury, as du Parcq J. did in this case, that "if a person is doing an unlawful act . . . . and because he is doing it, and in the course of his doing it, he kills somebody, he is guilty not only of that unlawful act but of manslaughter," was in effect withdrawing from them the right to find a verdict for dangerous driving only. The jury should have been asked to find whether the appellant was driving the car in such a reckless and dangerous manner that it amounted, within the definition in *Rex* v. *Bateman* (1), to an offence against the State or reached a stage of criminality over and above a contravention of s. 11 of the Road Traffic Act, 1930. A wide definition of the word "reckless" is essential to justify a conviction for manslaughter. If "reckless" driving causing death is always manslaughter, s. 34 of the Road Traffic Act, 1934, is meaningless. In *Rex* v. *Stringer* (2) the jury returned a verdict of not guilty of manslaughter, but on the same facts guilty of dangerous driving, death having been admittedly caused by the driving, and it was held that these verdicts were not inconsistent, obviously showing that in the opinion of the Court there is a difference in the degree of negligence necessary to constitute the two offences, a much greater degree having to be shown to establish the offence of manslaughter.

Sir Terence O'Connor S.-G. (*Arthur Morley K.C.* and *G. W. Wrangham* with him) for the Crown. If the proposition stated by du Parcq J. in the opening of his summing-up had stood alone its accuracy in law might be questioned, but later the judge stated the law correctly, directing the attention of the jury to the high degree of negligence amounting to recklessness

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(1) (1925) 19 Cr. App. R. 8. (2) [1933] 1 K. B. 704.

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which had been shown and which would justify a conviction for manslaughter. An act may be intrinsically unlawful, or though lawful by its nature it may become unlawful by being done recklessly. Where the jury finds recklessness of behaviour and death is caused thereby there is an ample degree of culpability to justify the verdict of manslaughter. [He was stopped.]

Russell Vick K.C. replied.

At the conclusion of the argument, the House stated that the appeal would be dismissed, and that their reasons would be given on a later date.

1937. April 22. Their Lordships now stated their reasons for dismissing the appeal.

LORD ATKIN. My Lords, this is an appeal under the necessary certificate of the Attorney-General from an order of the Court of Criminal Appeal dismissing an appeal by the appellant from conviction and sentence on a charge of manslaughter. The appellant was tried before du Parcq J. at Leeds Assizes in December, 1936, and, being convicted, was sentenced to be imprisoned for fifteen months and was disqualified for life from holding a motor driving licence.

He was indicted for manslaughter, the particulars of offence being that on June 27, 1936, he unlawfully killed William Burton Craven. The appeal is based solely on an alleged misdirection, and no issue is raised as to the facts, which can be stated shortly. The appellant, a man aged thirty-seven, was employed by the Leeds Corporation Transport Department at their Donisthorpe Garage. On Saturday, June 27, at about 10.30 P.M., he was directed to take a van to assist a Corporation omnibus which had broken down at Whingate, about three to four miles away. About 10.45 a man named Binks was driving a saloon car down the Tong Road away from Leeds at about ten miles an hour. He noticed about thirty yards ahead the deceased Craven crossing the road from Binks' near side. The road is about twenty-nine feet wide. The appellant, driving fast, over thirty miles an hour, overtook Binks' car, and driving well over on the off side of the road ran into Craven, who was then within three or four paces of the kerb. He was carried on the bonnet for a short period, thrown forward and run over by the van. The appellant, who immediately after the accident nearly ran into a pedal cyclist, did not stop. He returned to the garage after 11 stating that he had not found the omnibus. When challenged a day or two later he denied that he had travelled along the Tong Road on the Saturday night. At the trial he said he was unable to remember the journey at all. There was no dispute that in fact the appellant was driving the van which killed Craven. The road was well lighted and there were people about. On these facts there would appear to have been a very clear case of manslaughter, and the only question that arises is whether the learned judge correctly directed the jury.

My Lords, of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions. From the early days when any homicide involved penalty the law has gradually evolved "through successive differentiations and integrations" until it recognizes murder on the one hand, based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of intention to kill but with the presence of an element of "unlawfulness" which is the elusive factor. In the present case it is only necessary to consider manslaughter from the point of view of an unintentional killing caused by negligence, that is, the omission of a duty to take care. I do not propose to discuss the development of this branch of the subject as treated in the successive treatises of Coke, Hale, Foster and East and in the judgments of the Courts to be found either in directions to juries by individual judges or in the more considered pronouncements of the body of judges which preceded the formal Court of Crown Cases Reserved. Expressions will be found which indicate that to cause death by any lack of due care will amount to manslaughter; but as manners softened and the law became more humane a narrower criterion appeared. After all, manslaughter is a felony, and was capital, and men shrank from attaching the serious consequences of a conviction for felony to results produced by mere inadvertence. The stricter view became apparent in prosecutions of medical men or men who professed medical or surgical skill for manslaughter by reason of negligence. As an instance I will cite *Rex* v. *Williamson* (1) where a man who practised as an accoucheur, owing to a mistake in his observation of the actual symptoms, inflicted on a patient terrible injuries from which she died. " To substantiate that charge "—namely, manslaughter—Lord Ellenborough said, " the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention." The word " criminal " in any attempt to define a crime is perhaps not the most helpful: but it is plain that the Lord Chief Justice meant to indicate to the jury a high degree of negligence. So at a much later date in *Rex* v. *Bateman* (2) a charge of manslaughter was made against a qualified medical practitioner in similar circumstances to those of *Williamson's* case. (1) In a considered judgment of the Court the Lord Chief Justice, after pointing out that in a civil case once negligence is proved the degree of negligence is irrelevant, said (3), " In a criminal Court, on the contrary, the amount and degree of negligence are the determining question. There must be mens rea." After citing *Cashill* v. *Wright* (4), a civil case, the Lord Chief Justice proceeds: " In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets such as 'culpable,' 'criminal,' 'gross,' 'wicked,' 'clear,' 'complete.' But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment." Here again I think with respect that the expressions used are not, indeed they probably were not intended to be, a precise definition of the crime. I do not myself find the connotations of mens rea helpful in distinguishing between degrees of negligence, nor do the ideas of crime and punishment in themselves carry a jury much further in deciding whether in a particular case the degree of negligence shown is a crime and deserves punishment. But the substance of the judgment is most valuable, and in my opinion is correct. In practice it has generally been adopted by judges in charging juries in all cases of manslaughter by negligence, whether in driving vehicles or otherwise. The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied "reckless" most nearly covers the case. It is difficult to visualize a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter: but it is probably not all-embracing, for "reckless" suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction. If the principle of *Bateman's* case (1) is observed it will appear that the law of manslaughter has not changed by the introduction of motor vehicles on the road. Death caused by their negligent driving, though unhappily much more frequent, is to be treated in law as death caused by any other form of negligence: and juries should be directed accordingly.

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(1) (1807) 3 C. & P. 635.
(2) 19 Cr. App. R. 8.
(3) 19 Cr. App. R. 11.
(4) (1856) 6 E. & B. 891.

If this view be adopted it will be easier for judges to disentangle themselves from the meshes of the Road Traffic

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(1) 19 Cr. App. R. 8.

Acts. Those Acts have provisions which regulate the degree of care to be taken in driving motor vehicles. They have no direct reference to causing death by negligence. Their prohibitions, while directed no doubt to cases of negligent driving, which if death be caused would justify convictions for manslaughter, extend to degrees of negligence of less gravity. Sect. 12 of the Road Traffic Act, 1930, imposes a penalty for driving without due care and attention. This would apparently cover all degrees of negligence. Sect. 11 imposes a penalty for driving recklessly or at a speed or in a manner which is dangerous to the public. There can be no doubt that this section covers driving with such a high degree of negligence as that if death were caused the offender would have committed manslaughter. But the converse is not true, and it is perfectly possible that a man may drive at a speed or in a manner dangerous to the public and cause death and yet not be guilty of manslaughter: and the Legislature appears to recognize this by the provision in s. 34 of the Road Traffic Act, 1934, that on an indictment for manslaughter a man may be convicted of dangerous driving. But, apart altogether from any inference to be drawn from s. 34, I entertain no doubt that the statutory offence of dangerous driving may be committed, though the negligence is not of such a degree as would amount to manslaughter if death ensued. As an instance, in the course of argument it was suggested that a man might execute the dangerous manœuvre of drawing out to pass a vehicle in front with another vehicle meeting him, and be able to show that he would have succeeded in his calculated intention but for some increase of speed in the vehicles in front: a case very doubtfully of manslaughter but very probably of dangerous driving. I cannot think of anything worse for users of the road than the conception that no one could be convicted of dangerous driving unless his negligence was so great that if he had caused death he must have been convicted of manslaughter. It therefore would appear that in directing the jury in a case of manslaughter the judge should in the first instance charge them substantially in accordance with the general law, that is, requiring the high degree of negligence indicated in *Bateman's* case (1) and then explain that such degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving, and then indicate to them the conditions under which they might acquit of manslaughter and convict of dangerous driving. A direction that all they had to consider was whether death was caused by dangerous driving within s. 11 of the Road Traffic Act, 1930, and no more, would in my opinion be a misdirection.

In dealing with the summing-up in the present case I feel bound to say with every respect to the learned and very careful judge that there are passages which are open to criticism. In particular at the beginning of his charge to the jury he began with the statement that if a man kills another in the course of doing an unlawful act he is guilty of manslaughter, and then proceeded to ascertain what the unlawful act was by considering s. 11 of the Road Traffic Act, 1930. If the summing-up rested there, there would have been misdirection. There is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the Legislature makes criminal. If it were otherwise a man who killed another while driving without due care and attention would ex necessitate commit manslaughter. But as the summing-up proceeded the learned judge reverted to, and I think rested the case on, the principles which have been just stated. On many occasions he directed the attention of the jury to the recklessness and high degree of negligence which the prosecution alleged to have been proved and which would justify them in convicting the accused. On consideration of the summing-up as a whole I am satisfied that the true question was ultimately left to the jury, and that on the evidence the verdict was inevitable. For these reasons I came to the conclusion that the appeal should be dismissed.

LORD THANKERTON. My Lords, I have had the privilege

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(1) 19 Cr. App. R. 8.

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of considering the opinion which has just been delivered by the noble Lord on the Woolsack, and I desire to express my complete concurrence with it.

LORD WRIGHT. My Lords, I also agree; and I am asked by my noble and learned friend Viscount Finlay, who has also had the privilege of considering the opinion which has just been delivered, to say that he agrees.

LORD ROCHE: My Lords, I also concur.

Appeal dismissed.

Solicitors for appellant: *C. Butcher & Simon Burns for Morrish, Nelson & Co., Leeds.*

Solicitor for Crown: *Director of Public Prosecutions.*

Considered. BONYTHON *v.* COMMONWEALTH OF AUSTRALIA [1951] A. C. 201

[PRIVY COUNCIL.]

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MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF AUCKLAND, AND ANOTHER . . . . APPELLANTS;

AND

ALLIANCE ASSURANCE COMPANY, LIMITED . . . . RESPONDENTS.

Considered NA BANK OF AUSTR LASIA *v.* SCOTTIS UNION [1952] A.C. 49

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Currency—Debentures—Issued by Municipal Corporation—Interest and debenture payable in London at option of holder—Depreciated New Zealand currency—Option exercised—Interest and debenture payable in English currency without allowance for exchange—Local Bodies Loans Act (*N. Z.*), *No.* 30 *of* 1913, *s.* 29, *sub-s.* 1; *ss.* 32, 33, 42.

The respondents were the holders of a number of debenture bonds in denominations of 100*l.*, dated 1920, and the interest coupons outstanding under them, which were issued by the Auckland, New Zealand, Corporation under the Local Bodies Loans Act, 1913, and s. 26 of the Appropriation Act, 1915, in payment for the purchase by the Corporation from a private undertaking of the City's tramway system. The debentures and the interest thereon, at the rate of 5½ per cent. per annum, were payable at the holder's option either in Auckland, New Zealand, or in London. The currency of New Zealand having become depreciated the respondents exercised their option to be paid in London, and, having been there offered payment of the equivalent in sterling of the nominal amount in New Zealand currency, they claimed a declaration that they were entitled to be paid in sterling—in the currency of England—both as to principal and interest, without any deduction for exchange:—

Held, that there being a common unit of account, the pound, in England and New Zealand, the mode of performance of the contract must be governed by the law of the place of performance, and accordingly the debt must be discharged by payment in the currency of the place of payment. Provided, therefore, that the bearer exercised his option to be paid in London, the interest coupons were payable in English currency without any allowance for exchange, as also were the debentures when they fell due.

Adelaide Electric Supply Co. v. *Prudential Assurance Co.* [1934] A. C. 122, discussed and applied.

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT M.R., and LORD MAUGHAM.

Westralian Farmers, Ld. v. *King Line, Ld.* (1932) 48 Times L. R. 598; 43 Ll. L. Rep. 378, and *Saskatoon* v. *London & Western Trusts Co.* [1934] 1 D. L. R. 103, referred to.

The Local Bodies Loans Act, 1913, which contained a code regulating the conditions and the procedure under which a local authority in New Zealand were entitled to borrow money for public purposes, did not take the present case out of the ruling in the *Adelaide* case (supra). The word "pound" contemplated and authorized by that Act meant the common unit of account current in Great Britain and in various parts of the British Empire, and the currency which it connoted in the case of any particular loan would be determined by the place, whether within or outside New Zealand, stipulated as the place of payment in the debenture.

Australasian Temperance and General Assurance Corporation, Ld. v. *Mount Albert Borough* [1936] N. Z. L. R. 54, and *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (1933–4) 50 C. L. R. 581, referred to.

Judgment of the Court of Appeal of New Zealand [1936] N. Z. L. R. 413, affirmed.

APPEAL (No. 86 of 1936) from a judgment of the Court of Appeal of New Zealand (May 10, 1936).

The respondents, the Alliance Assurance Company, Ld., the holders of a large number of debentures issued by the appellants, the Auckland Corporation, originally in payment for the purchase by the Corporation of the City's tramway system, brought the present action on one of the debentures and an interest coupon against the Corporation for a declaration that they were entitled to be paid in sterling—in the currency of England—both the interest on the debenture and the debenture when it fell due; in particular they claimed payment of 13*s.* 1*d.* as being the difference between 2*l.* 12*s.* 6*d.*, the interest due under the coupon in question, and the sum of 1*l.* 19*s.* 5*d.* tendered to them in respect of that coupon when, having exercised their option to be paid in London, they duly presented the coupon for payment at the Bank of New Zealand in London. That sum of 13*s.* 1*d.* represented the difference in value between sterling and New Zealand currency as applied to the amount of 2*l.* 12*s.* 6*d.* expressed in the coupon.

The debenture bond in question was for 100*l.* It was issued on February 9, 1920, and was headed: "Auckland City Council, Auckland, New Zealand. Auckland City

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Tramway Loan of 1,250,000*l.* Secured on the revenues of the City of Auckland, ..." and was payable at the holder's option either in Auckland, New Zealand, or in London on July 1, 1940, and was expressed to be issued under the Local Bodies Loans Act, 1913, and s. 26 of the Appropriation Act, 1915. The coupon in suit contained the following provision: "On presentation of this coupon at the Bank of New Zealand, London, England, or Auckland, New Zealand, at the option of the holder for the time being on or after January 1, 1936, the bearer will be entitled to receive 2*l.* 12*s.* 6*d.*"

The further facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

The action was tried in the Court of Appeal under an order for removal to that Court on an agreed statement of facts. The Court (Ostler, Blair and Kennedy JJ., Reed A.C.J. dissenting) were of opinion that the claim should succeed. The majority were of opinion that in principle the case was governed by *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* (1), and accordingly that moneys payable on the debenture or the coupon, if the bearer elected to be paid in London, were payable in sterling or in British pounds. The judgment is reported at [1936] N. Z. L. R. 413.

1936. Nov. 30; Dec. 1. *Hon. S. O. Henn Collins K.C., Alexander Ross* and *Joseph Stanton* (of the New Zealand Bar) for the appellants. The question is whether in respect of the capital of and interest on certain debentures issued by the appellant Corporation the holder who exercises the option thereby conferred upon him of requiring payment in London, is entitled to be paid the nominal amount in sterling, or the equivalent in sterling of the nominal amount in New Zealand currency. There is also a subsidiary question, whether, conceding that the contract is for the payment of the nominal amount in sterling, it was a contract which, in view of the provisions of the Local Bodies Loans Act, 1913, was ultra vires the Corporation. The majority of the judges in the Court of Appeal of New Zealand felt themselves constrained by the decision in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* (1) to hold that in this case there was at all material times a "pound" common to New Zealand and to England, and that that served to measure the debt between the parties, and that the debt so measured fell to be paid in the currency of the country where according to the contract payment had to be made: if in England, then in English currency. It is contended that the "pound" means the New Zealand pound. At the material time there was a difference between the identity of the pound as used in New Zealand and that in England. In the *Adelaide* case (1) at the material time there was no difference between the pounds, they were common elements; before the time for payment came they had drifted apart. Here they were apart at the material time and they remained apart: that is the distinction. The word "pound" is used in three ways: (1.) as a unit of account; (2.) as a unit of value; and (3.) as a unit of currency. When used as a unit of account its sole function is to state the relation one transaction bears to another, but it does not matter what symbol is used for that purpose. When used as a unit of measure of value, the function is to express the amount of the debt. When used as a unit of currency the function is to determine how many of the specified coins are to be paid or received in respect of the debt. When a local transaction is being considered—where the whole transaction begins and ends in one country—and not an international one, these three functions are either not distinguishable or are not distinguished. The accounts are kept in the denomination of the currency, and that is the currency which will be used to discharge the debt, and it quantifies the amount of the debt. The fact must not be lost sight of that when symbols are used reference is made prima facie to local currency, and local currency is therefore, prima facie at any rate, the measure of the debt. Once the quantum of the debt has been arrived at it is conceded that if it has to be paid in a certain place it must be paid by the currency that the law requires in discharge of a debt at that place. But the first

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(1) [1934] A. C. 122.

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(1) [1934] A. C. 122.

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step is to quantify the debt. In the case of a transaction not local, but which travels outside the country, if there has been expressed in the obligation the particular currency, be it pounds or francs, in which the debt is to be paid, the value of the debt has thereby been quantified, subject to fluctuations of exchange between the two countries. At that point the local laws of currency step in and they determine what shall be a good discharge of the debt. A fixed amount is payable according to the contract, and the fact that it is payable in one place or the other does not affect the amount of the debt, which is predetermined.

Where a symbol is common to two currencies, common not merely as a symbol but as expressing the same thing, there is no difficulty at all. In the *Adelaide* case (1) the two pounds were not two different pounds, but one, ultimately referable to so much fine gold, and it was quite clear what the parties were talking about. The first step in the present case is to satisfy the Board that at the material time, 1920, the New Zealand pound and the English pound were different. At that time England was still on gold, New Zealand was not, whereas in the *Adelaide* case (2) both pounds were referable to gold, and in that sense there is a real and not a mere notional difference. The first question is, about what pound were the parties contracting? and that cannot be discussed better than it was by Reed A.C.J. (3) [Reference was made to the *Adelaide* case (2), and to *Payne* v. *Deputy Federal Commissioner of Taxation* (4), where, in the argument, Lord Warrington of Clyffe is quoted from the *Adelaide* case (5): "I have come to the conclusion that, merely as a unit of account, the pound symbolised by the £ is one and the same in both countries, and that the difference in the currencies merely concerns the means whereby an obligation to pay so many of such units is to be discharged."

Taking the bond alone, a sum is arrived at in New Zealand pounds although in arriving at that sum English and New

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(1) [1934] A. C. 122.

(2) Ibid. 122, 124, 134, 138, 142, 147, 149–50.

(3) [1936] N. Z. L. R. 435.

(4) [1936] A. C. 497.

(5) Ibid. 501.

Zealand pounds are taken into account. That sum, which is a New Zealand sum, is to be discharged, prima facie at any rate, in New Zealand currency. With regard to the coupon, that must be visualized as something issued in New Zealand to somebody in New Zealand, and the Corporation undertake to pay 2*l.* 12*s.* 6*d.* It is submitted that that means 2*l.* 12*s.* 6*d.* in New Zealand currency. Once the value of the debt is fixed as 2*l.* 12*s.* 6*d.* New Zealand currency, then the rest follows, and that has to be discharged when the option is exercised by payment in England in English pounds, making due allowance for the rate of exchange.

Stanton followed. It would have been ultra vires of the Corporation to issue debentures for payment in any currency but New Zealand currency. [Reference was made to the New Zealand Tramways Act, 1908, under which the power to buy for cash is given, and to the Local Bodies Loans Act, 1913.] These local bodies are strictly bound by the terms of their statutes. In this case they received power to borrow and they issued debentures in pursuance of the authority so given. The Chief Justice refers to s. 32 of the Act of 1913 with a view to showing that enforcement for practical purposes must take place in New Zealand. The risks of fluctuation of exchange have to be borne by somebody, and there is no indication in this Act that the Legislature intended them to be borne by the local body rather than by the lender. When this Act requires these debentures to be issued in terms of pounds they can be issued only in pounds, not, for instance, in dollars or francs or marks. If that be so, then it seems to follow that the pound in which they are to be issued must be the pound in New Zealand currency, and it is only this pound that the New Zealand statute would contemplate: *Payne* v. *Deputy Federal Commissioner of Taxation.* (1) When a statute speaks of currency it means the currency of that country, and that is a principle of general application to all statutes and not only to taxing statutes. [Reference was made to *Gisborne Borough* v. *Auckland Provincial Patriotic and War Relief Association.* (2)] From the present Act in

(1) [1936] A. C. 497, 508.

(2) [1916] N. Z. L. R. 218.

1913 down to 1920, when these debentures were issued, that New Zealand currency was a recognized currency on which the New Zealand Acts operated and to which alone the word "pounds" or the symbol "£" must normally refer: *Saskatoon* v. *London & Western Trusts Co., Ld.* (1) This contract—the debentures and the coupon—must be regarded as governed by New Zealand law: *Mowbray, Robinson & Co.* v. *Rosser* (2); *International Trustee for the Protection of Bondholders Aktiengesellschaft* v. *R.* (3) [Reference was also made to *Barcelo* v. *Electrolytic Zinc Co. of Australasia, Ld.* (4); *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (5); and *Australasian Temperance and General Assurance Corporation, Ld.* v. *Mount Albert Borough.* (6)] It has been suggested that when a contract—still meaning the debentures and the coupon—refers to a currency, the units of which are common to the two countries concerned, then the particular currency in which the payment is to be made is in each case to be determined by the place of payment. The correct statement would be that in all such cases the intention or the presumed intention of the parties must be ascertained from all the circumstances, of which the place of payment is only one, and not necessarily the dominant one: *Lansdowne* v. *Lansdowne and Others.* (7) The place of payment is of quite secondary importance in determining which currency is intended. The latest application of the rule is in *Ottoman Bank of Nicosia* v. *Dascalopoulos.* (8) [Reference was also made to *Broken Hill Proprietary Co.* v. *Latham.* (9)] It is submitted that it is not possible to regard the final aggregate sum as expressed in other than New Zealand currency, although mixed sums may have been added together.

Gavin Simonds K.C. and *Wilfrid Barton* for the respondents, were called upon to argue on the ultra vires point only. The question whether it is intra vires or not must depend on the

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(1) [1934] 1 D. L. R. 103, 111.

(2) (1922) 91 L. J. (K. B.) 524.

(3) [1936] W. N. 325: revd. see p. 500 ante.

(4) (1932) 48 C. L. R. 391.

(5) (1933–4) 50 C. L. R. 581.

(6) [1936] N. Z. L. R. 54, 74, 81.

(7) (1820) 2 Bligh, 60, 95.

(8) [1934] A. C. 354.

(9) [1933] 1 Ch. 373, 391.

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position of the law at the date of the issue. In 1920 there was no such divergence as that it could not be said that they were not the same pounds, founding on the *Adelaide* case. (1) The authority conferred by the Local Bodies Loans Act is an authority to raise a loan in pounds, and at the date of the Act there could be no doubt whatever that the symbol "£" applied equally to the pound in New Zealand and the pound in England. In 1920, when the loan was raised, it was competent for the local authority to raise a sum in sterling because the English and New Zealand pounds were then substantially the same, and nothing had happened to limit the authority which existed in 1913 to raise the money in sterling in the London market. The Act of 1913, by virtue of the language of s. 26, sub-s. 2, did authorize the raising of a loan in pounds, and that included English pounds so long as it could be predicated of English and New Zealand pounds that they were not different things. The authority of the *Adelaide* case (1) is conclusive that the English and the New Zealand pounds were not different things. As was said also by Ostler J. in the present case (2): "The pounds which were spoken of in the Local Bodies Loans Act, 1913, as pounds which a local authority could borrow were British pounds, for in 1913 . . . . there was no separate New Zealand pound. If, as I have held, the pounds continued to be the same thing in 1920 when the contract was made, then the pounds spoken of in this contract were British pounds. The contract provided that so many pounds' worth of interest should be paid to the debenture-holders either in Auckland or in London. If they elect to be paid in London they are entitled to be paid in British pounds."

Collins K.C. replied.

1937. Jan. 26. The judgment of their Lordships was delivered by LORD WRIGHT M.R. The question to be determined in this appeal is what are the rights of the Alliance Assurance Company, Ld., the respondents, under a debenture bond for 100*l.* and the coupons still outstanding under it, of

(1) [1934] A. C. 122. (2) [1936] N. Z. L. R. 449.

which they are bearers. The bond and coupons were issued by the Mayor, Councillors and Citizens of the City of Auckland in New Zealand, the defendants in the action and the appellants before this Board. The Auckland Transport Board, who were third parties in the action, are also appellants, but no question arises in this appeal as to their position.

The debenture bond is numbered 1744 and is for 100*l.* It was issued under the common seal of the appellant Corporation on February 9, 1920. It is headed: "Auckland City Council, Auckland, New Zealand. Auckland City Tramway Loan of 1,250,000*l.* Secured on the revenues of the City of Auckland, subject to the existing loans chargeable on such revenues," and is payable at the holder's option either in Auckland, New Zealand, or in London on July 1, 1940, and is expressed to be issued by the Auckland City Council, New Zealand, under the Local Bodies Loans Act, 1913, and s. 26 of the Appropriation Act, 1915. It provides by its terms that: "On presentation of this debenture either at the Bank of New Zealand, Auckland, New Zealand, or at the Bank of New Zealand, London, England (at the option of the holder hereof) on the first day of July, 1940, the bearer will be entitled to receive 100*l.* Interest on this debenture will cease after the day when the payment falls due unless default is made in payment. This debenture bears interest at the rate Five pounds five shillings per centum per annum payable on the first days of January and July in each year on presentation of the attached coupons."

The coupon now in suit is No. 33. It is headed: "Auckland City Tramway Loan, 1920. Of the City of Auckland, New Zealand, issued under The Local Bodies Loans Act, 1913, and s. 26 of The Appropriation Act, 1915, secured on the revenues of the City of Auckland, subject to the existing Loans chargeable on such revenues." It contains the following provision: "On presentation of this coupon at the Bank of New Zealand, London, England, or Auckland, New Zealand, at the option of the holder for the time being on or after the first day of January, 1936, the bearer will be entitled to receive 2*l.* 12*s.* 6*d.*"; it is signed by the Mayor and the City Treasurer. The series of debentures, of which No. 1744 forms one, was issued under the following circumstances. An English registered company had, some years before 1919, constructed a tramway system in the City of Auckland. In 1919 while they were operating the system they gave an option to the appellant Corporation to purchase the tramway undertaking with all its assets. In consequence an agreement was entered into, dated February 16, 1920, between the English tramway company and its mortgagees, an English investment company, on the one hand, and the appellant Corporation on the other, for the sale of the whole of the tramway undertaking, its lands, its various rights and all its assets, for the total aggregate sum of 1,227,201*l.* 8*s.* 7*d.* The price was to be satisfied by a payment to the vendors of 1*l.* 8*s.* 7*d.* in cash, and by the issue to them of debentures for the total sum of 1,227,200*l.* According to the agreement, the rate of interest on a certain proportion of these debentures was 5*l.* per cent. per annum, and as to the balance 5*l.* 5*s.* per cent. per annum. The agreement provided that the debentures should rank pari passu, and should be payable both as regards principal and interest at the option of the holder for the time being either in London or Auckland, and should be in denominations from 20*l.* to 1000*l.*, as required by the vendors. The consideration for the sale was arrived at on the basis of certain items which were set out in the agreement. Certain of these items were sums of sterling, in particular, the amount of the mortgage debt of the tramway undertaking, which was 393,750*l.*, and the amount representing the net profits, subject to an allowance, of the tramway company for the year ending June 30, 1919. Other sums were presumably in New Zealand currency, such as the sum representing the liabilities of the tramway company existing at the date of the agreement. There was nothing expressed in the agreement to show in what currency the sum of 750,000*l.*, which was the major part of the consideration, was calculated. The transaction thus took the form of a sale by the vendors to the appellants as purchasers of the property for the sum above stated. This sum was satisfied by a cash payment of 1*l.* 8*s.* 7*d.* and by the issue of the debentures. The transaction amounted in substance to a borrowing from the vendors by the purchasers of the balance of the purchase price, which took the form of the issue of the debentures.

The dispute which has now arisen is whether the respondents are entitled to be paid the principal and interest in sterling, that is, in the currency of England, on the assumption or basis of their having availed themselves of the option to be paid in London, or whether their right on that footing is merely to be paid in the currency of New Zealand, which in 1936 was considerably depreciated. The action, which was brought by the respondents, claimed a declaration that they were entitled to be paid in sterling, that is, in the currency of England, both as to principal and interest, and in particular claimed payment of 13*s.* 1*d.*, as being the difference between 2*l.* 12*s.* 6*d.*, the sum due under the coupon in question, and the sum of 1*l.* 19*s.* 5*d.*, the sum tendered to them in respect of their coupon when, having exercised their option to be paid in London, they duly presented the coupon for payment at the Bank of New Zealand in London. This sum of 13*s.* 1*d.* represented the difference in value between sterling and New Zealand currency as applied to the amount of 2*l.* 12*s.* 6*d.* expressed in the coupon.

The rights and liabilities under the debenture and the coupon depend on the terms set out in them. For the purposes of this appeal the question can be considered as if the instrument simply provided for payment in London; the option to require payment in New Zealand may be disregarded, as the actual or assumed basis of the proceedings is that the London option has been duly exercised. The instruments, as already stated, bear on their face a reference to the Local Bodies Loans Act, 1913 (hereinafter called the Act of 1913), and s. 26 of the Appropriation Act, 1915. The latter Act is not material, but the former Act requires to be considered. The appellant Corporation are a statutory body incorporated in New Zealand and are subject to the Act of 1913, which contains a code regulating the conditions and the procedure under which a local authority such as the appellant

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Corporation are entitled to borrow money for public purposes, including the purchase or acquisition of any land, building, erection or structure. It is not disputed that the appellant Corporation are bound by the conditions of the Act, and that these conditions are made part of the terms of the debenture and coupon by the express reference to the Act already mentioned. The various requirements of the Act for the purpose of obtaining the consent of the ratepayers were in form duly complied with. The Act also provided for the security which might lawfully be pledged for a loan. Certain sections of the Act which have been the subject of argument before their Lordships call for special mention. These deal in particular with the form and contents of any debentures. Thus it is enacted that the debentures shall be for sums of not less than 20*l.* and not more than 1000*l.*, and shall be in the form set out in the schedule. That form was precisely followed in the series of debentures in question. The matter most material to be noted is that the debenture in the scheduled form is to be for [blank] pounds, using the symbol £. This agrees with the provision in the body of the Act just quoted that the sum is to be for not less than 20*l.* and not more than 1000*l.* The Act also prescribes that the yearly interest on every debenture shall not exceed 5½ per cent., and shall be payable half-yearly or otherwise. There is also a prescribed form of coupon, which requires the amount to be expressed in pounds. The coupon in question complies with the prescribed form. Sect. 29, sub-s. 1, provides that the local body may appoint any incorporated company or association, or any such company or association together with one or more persons within or out of New Zealand, to be agents for raising and managing any loan authorized to be raised under this Act, such agent to have full power to raise the loan and to deal with the moneys subject to the direction of the local authority. The Act also contains a series of provisions dealing with the repayment of the loan, of which the most material are s. 32, which provides that the sum of money named in any debenture shall be payable at the place within or out of New Zealand named in the debenture at the time named thereon, being not longer than fifty years from the issue thereof, and s. 33, which requires the local authority to make provision for a repayment either by means of a sinking fund, or by periodical drawings. Sect. 42 may also be mentioned. That section provides for the case of default being committed in payment of the sum secured by any debenture or any coupon when it is presented at the place where, and the time when, it is payable or subsequently. In that event the holder is entitled to apply to a judge of the Supreme Court (that is of New Zealand) by a petition in a summary way for relief under the Act, and the judge is authorized to appoint a receiver of the local fund or other property of the local authority which is liable under the provisions of the Act for the payment of the debenture or coupon.

In 1913, when this Act was passed, the gold sovereign was legal tender both in England and New Zealand, and the various notes current in both countries were redeemable in gold. In both countries the unit of account, the pound, was the same. The word "pound" accordingly at that time, whether used in an instrument made in New Zealand, or in an instrument made in England, had, in the full sense of the term, the same connotation; it meant the same unit of account, and the measure of value in currency which it connoted was the same—namely, the gold sovereign, minted by the Royal Mint, whether at the English Mint or at its Australian branch or branches. It is not necessary here to deal specifically with shillings and pence; these also were the same in both countries as units of account, and were represented as measures of value in currency by silver and bronze token coins. On the outbreak of the Great War in August of 1914, changes were made in the currency in each of the two countries. Both in England and in New Zealand gold coins for all practical purposes went out of circulation. In England the export of gold, which had previously during the War been prohibited by regulation, was prohibited by an Act of 1920. In 1925, by the Gold Standard Act of that year, the Bank of England, which had been under an obligation to pay its own notes and the Treasury notes then current in gold, was relieved of that obligation, and was only required to sell bullion in bars of about 400 oz. at a fixed rate. Then in 1931, by the Gold Standard Amendment Act of that year, the obligation to sell gold bullion at a fixed rate was suspended. Thus in England by 1931 the country had gone off the gold standard and the notes of the Bank of England which constituted the note circulation were no longer convertible in gold. In New Zealand a somewhat different course was taken. Before 1913 there were a certain number of trading banks in New Zealand issuing their notes of a denomination of 1*l.* or upwards, which were in form promises to pay a pound or pounds sterling. In 1914 there was passed in New Zealand the Banking Amendment Act, 1914, under which the Governor in Council was empowered by proclamation to declare that notes payable on demand by any bank named in the proclamation, and subsequent issues, should be, during the period limited by the proclamation, legal tender in New Zealand. While any such proclamation was current, the condition that the bank should pay notes of its own issue in gold on presentation at the bank was to be suspended for the period limited by the proclamation first made under the Act or by successive proclamations, if more than one. But the Act provided that the Governor in Council might require that adequate security should be given by the bank for the performance of the condition that the bank would duly pay its notes in gold after the expiration of the period limited by the proclamation or proclamations. During the period limited by any proclamation the export of gold was prohibited, except with the consent in writing of the Minister of Finance. In fact, a proclamation was made in 1914 under this Act for two years, and thereafter further such proclamations were successively made from time to time. These proclamations covered the whole period from August, 1914, until August, 1934. At that latter date the Reserve Bank of New Zealand Act, 1933, came into operation, under which the Reserve Bank of New Zealand was empowered to issue bank-notes, and the authority of the various trading banks to issue or reissue bank-notes in New Zealand was determined. Thereupon the bank-notes of these banks practically went out of circulation. The bank-notes of the Reserve Bank, which are now practically the only notes in circulation in New Zealand, are in form a promise to pay so many pounds, and contain no reference to sterling, unlike the notes previously issued by the trading banks. The position, in effect, has thus been that from 1914 until 1934 the redeemability of the note currency in gold was suspended. No doubt the Act of 1914 was originally intended to be an emergency measure for the time, but by the successive renewal of proclamations the operation of the Act was continued until, in 1934, the note currency was finally and definitely made irredeemable in gold. These respective changes in the legal tender or currency of the two countries have had a reflection in the rate of exchange and in the relative values inter se of the two currencies. If regard is had to the telegraphic selling rates, New Zealand on London, there had before 1914 been a variation depending, presumably, on the relation of supply and demand. Thus from 1904 to 1914 the rate, New Zealand on London, was at 17*s*. 6*d*. per cent. premium. From December, 1917, to September, 1920, it was 20*s*. per cent. premium. It then rose for about two years, but in 1922 it was 5*s*. per cent. premium, and in 1924 for a short period it was at par; in 1925 it was at a discount; in 1930 the premium had actually risen to 5*l*. Eventually, in 1933, there was a steep rise in the premium; in January, 1933, the exchange stood at 125*l*. New Zealand for 100*l*. London, and in August, 1934, at 124*l*. 10*s*. It was in consequence of that marked divergence in value between the two currencies that the present difficulty has arisen. Until that occurred the debenture coupons in cases where the London option was exercised were paid in English currency without question. But the appellants in and after 1934 contended they were only bound to pay in New Zealand currency, and in the result the present action was brought.

The case was tried in the Court of Appeal under an order for removal to that Court on an agreed statement of facts.

The Court was divided in opinion. The majority, consisting of Ostler, Blair and Kennedy JJ., were of opinion that the claim of the respondents should be upheld. Reed A.C.J. dissented, and was for deciding in favour of the appellant Corporation. He was of opinion that the New Zealand pound was a different unit of value from the English pound, and was of a different value from the English pound, and that in all the circumstances of the case the proper inference to be drawn was that the moneys to be paid under the debenture and the coupon were to be computed in the New Zealand currency, free from any allowance or deduction for conversion from New Zealand currency into English currency. In his view the contract was a purely New Zealand contract because it was made under the authority of the municipal law of New Zealand, and in reference to the purchase of an undertaking which was operated in New Zealand, and because repayment of the money was secured on property situated in New Zealand, and also because the debentures were delivered in New Zealand to be disposed of as the vendors of the tramway undertaking thought fit. He also relied on the circumstance that the contract was subject to the terms of the Local Bodies Loans Act of 1913. The three judges who took the contrary view were of opinion that in principle the case was governed by the decision of the House of Lords in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* (1), and accordingly that moneys payable on the debenture or the coupons, if the bearer elected to be paid in London, were payable in the appropriate number of pounds according to the currency of England, that is, in sterling or in British pounds. Though the proper law of the contract was New Zealand law, that did not affect, in their opinion, the result in this case that where the place of payment was in London, the money was payable in sterling. They further held that there was nothing in the terms of the Act of 1913 to lead to any other conclusion, because they held that it was not ultra vires to contract loans such as those in question in any other than New Zealand currency, and

(1) [1934] A. C. 122.

that the terms of the Act did not compel, irrespective of the place of payment, a construction of the word "pound," connoting a payment according to the currency of New Zealand.

Their Lordships are in substantial agreement with the conclusions of the majority of the Court. Up to a point, in their judgment, this case in principle is precisely governed by the opinions of the House of Lords in the *Adelaide* case. (1) That authority, it is true, had reference to a contest whether sterling, that is, English currency, or Australian currency, was applicable; but for all purposes of the present appeal, there is no difference in substance between the divergence which occurred in the currency values as between England and Australia, and the divergence which occurred in the currency values as between England and New Zealand. There are two dates which in a case of this sort may have to be considered as material dates; one is the date when the contract is made, and the other is the date at which the contract requires payment to be effected. It is as at the latter date that the measure of value expressed by the word "pound" in the contract will have to be ascertained, and that will depend on the precise state of the relevant currency at the particular date; but it is as at the date of the contract that it must be decided what currency is meant by the contract as the currency or measure of value in which the contract obligation is to be discharged. That latter question can only be settled by determining as a matter of construction what in all the circumstances of the case is the meaning of the word "pound" used in the contract. This problem only arises where the contract uses a common unit of account, like the pound, as the denomination in which the obligations are expressed. A difficulty arose in the *Adelaide* case (1) because in 1921 a change was made in the articles of association of the Adelaide company, which was an English registered company, whereby the place of payment for the debenture was shifted from London to Adelaide in Australia. Up to that time, while the place of payment was in London, there could be no question that the term "pound" used in the articles of association had reference to English or sterling currency. In 1921, when the articles were changed in the sense explained, there were no express terms inserted to define in what currency the payment was to be made. The reason for that omission no doubt was that the parties did not think about it because at that time the difference between the sterling pound and the currency pound was little more than negligible; indeed, it could not definitely be pronounced in what direction the exchange would go, whether in favour of London or Australia. But when, at a much later date, namely 1931, there emerged a very substantial divergence in the values of the two currencies, the problem was raised which was eventually settled by the House of Lords. The five Lords of Appeal who gave judgment in the House of Lords were all in agreement as to what the decision of the House should be. Lord Russell puts the problem and the answer in these terms: He says (1): "If this be the correct view this problem would resolve itself into a case of the Company becoming indebted from time to time in amounts payable in Australia, and expressed in terms of units of account common to Australia and England. The question then is, how can the Company discharge that indebtedness? The answer can I think only be, in whatever currency is legal tender in the place in which the indebtedness is dischargeable. It is not a question what amount of coins or other currency has the debtor contracted to pay. A debt is not incurred in terms of currency, but in terms of units of account. It is a question of discharging a debt incurred in terms of units of account common to more than one country, in the currency which is legal tender in the particular country in which the debt has to be paid."

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(1) [1934] A. C. 122.

It is quite clear that the whole problem arose because of the divergence in value of the two currencies, and it was solved, as a question of construction, by determining what currency, on the true construction of the contract, was connoted by the use of the word "pound." It was held that in the absence of express terms to the contrary, or of matters in the contract raising an inference to the contrary, the currency of the country in which it was stipulated that payment was to be made was the currency meant. Contracts are expressed in terms of the unit of account, but the unit of account is only a denomination connoting the appropriate currency. The problem is only likely to arise where the contract is made at a time when there is little or no practical difference between the two currencies of the two countries concerned, or where they have both the same currency and the same unit of account, but subsequently at the due date of performance the values of the two currencies have sharply diverged. If at the time when the contract is made there is a practical divergence in value between the two currencies, the parties in all probability will expressly stipulate what currency is intended. An illustration of such a case is to be found in *Westralian Farmers, Ld.* v. *King Line, Ld.* (1) A charterparty made in September, 1930, for the charter of a British ship on a voyage from Western Australia to Great Britain or the Continent contained various stipulations for payments, some to be made in Australia and some in Great Britain. The latter were stipulated to be payable in sterling, but the former sums were stipulated to be payable in Australian currency. The parties had thus by their express agreement excluded any question as to what currency was intended. It seems also that *Saskatoon* v. *London & Western Trusts Co., Ld.* (2), was decided on the principle that there was in that case an express term, embodied in the by-laws under which the debenture was issued, providing that the debentures and coupons were to be payable in lawful money of Canada or in sterling money of Great Britain. The debentures were expressed in dollars, and it was held that the terms of the by-laws excluded all other methods of payment than a payment either in lawful money of Canada or in sterling money, and accordingly that the debentures, which were expressed in dollars, were payable in Canadian dollars, though they were made payable at the offices of the Bank of Montreal in New York or at the offices of the said bank in London, England.

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(1) [1934] A. C. 148.

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(1) 48 Times L. R. 598; 43 Ll. L. R. 378.

(2) [1934] 1 D. L. R. 103.

In the *Adelaide* case (1), however, there was no express term to show what currency was intended by the word "pound." The House of Lords held that the true meaning of the word "pound" must be determined on the basis of a rule depending on a well known principle of the conflict of laws—namely, that the mode of performance of a contract is to be governed by the law of the place of performance. That principle, no doubt, is limited to matters which can be fairly described as being the mode or method of performance, and is not to be extended so as to change the substantive or essential conditions of the contract; but when it applies, as in the *Adelaide* case (1), it has the effect of introducing into the contract the law of currency or legal tender governing in the place of payment as a mode or method incidental to performance. Thus, where there is a common unit of account, to which the same denomination applies, as is the case with the word "pound" here, the debt expressed in the common unit of account must, in the absence of contrary evidence of actual intention, be discharged by payment in the currency of the place of payment. That was the decision in the *Adelaide* case (1), which, subject to a further matter, to be next discussed, governs the present case.

In this case, as in the *Adelaide* case (1), the pound is the common unit of account. It is true that at the date of the debenture there was little or no practical difference between the value of the New Zealand currency in New Zealand and the value of the sterling currency in England; no doubt for that reason the parties did not feel it necessary expressly to stipulate which currency was intended by the contract. That was left to be determined by the Court in accordance with the general principles of law, and in accordance with the place of payment which the bearer adopted under the option given to him. It has, however, been strenuously contended that there is a further factor to be taken into consideration here—namely, the conditions of the Local Bodies Loans Act of 1913. The material provisions of that Act have already been set out in an earlier portion of this judgment. It is contended on behalf of the appellants that the Act of 1913 takes this case out of the ruling in the *Adelaide* case (1) on one or other or on both of two grounds. It is said in the first place that the effect of the Act of 1913 was to render it ultra vires of the Corporation to borrow in any other than pounds, that is to say, the pounds meant by the Act, which were New Zealand pounds, and that the contract must anyhow be so construed, whatever the place of payment, in order to prevent it being held ultra vires and void, on the principle ut res magis valeat quam pereat. It is further or alternatively contended on similar grounds that the prima facie rule of construction applied in the *Adelaide* case (1) is excluded by the conditions of the Act of 1913 incorporated in the documents, which require that the debentures and coupons should be issued in pounds, that is New Zealand pounds, as being the pounds postulated by the Act of 1913. Their Lordships cannot accept either contention. They do not think any question of ultra vires arises. On the plain reading of the Act of 1913 they think that the "pound" contemplated and authorized by the Act means the common unit of account current in Great Britain and in various parts of the British Empire, and that the currency which it connotes in the case of any particular loan will be determined by the place, whether within New Zealand or outside of New Zealand, stipulated as the place of payment in the debenture. The sections of the Act of 1913 quoted above in this judgment show clearly that the place of payment contemplated by the Act may be a place either within or without New Zealand. This in particular appears from s. 32 and from s. 29, sub-s. 1, and other sections which are quoted above. For obvious financial reasons, a country like New Zealand will desire to raise money in other than the local financial markets. Thus it may desire to float a loan in England or in one of the Australian States; if it floats such a loan and issues debentures expressed in pounds payable in London or in (e.g.) Melbourne,

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(1) [1934] A. C. 122.

(1) [1934] A. C. 122.

such a financial operation is within the conditions of the Act, and will carry with it, according to the rules of law now established, the consequence, that if nothing more is said in the debenture, the pounds in question will connote a currency either of England, if the loan is repayable in London, or of Australia, if the loan, for instance, is repayable in Melbourne. That such a loan is within the provisions of the Act of 1913 has already been recognized by the Court of Appeal in New Zealand in the case of the *Australasian Temperance and General Assurance Corporation, Ld.* v. *Mount Albert Borough.* (1) In that case the debentures were issued in New Zealand under the Act of 1913, payable at the Bank of New Zealand, Melbourne, and were expressed to be in pounds. The question debated in that case was not the determination of the currency, but was whether the law of Victoria which had enacted a general reduction of the rate of interest payable in respect of loans, applied to the New Zealand contract, under which the interest on the loans was to be paid in Melbourne. The Court of Appeal in New Zealand held that it did not; they distinguished the *Adelaide* case (2) on the ground that in the *Adelaide* case (2) the question was merely as to the mode or method of performance, whereas in the case before them the Victorian law did not and could not have the effect of changing the substance of the New Zealand contract. It is, however, clear that the Court of Appeal treated the debentures as properly issued within the terms of the Act of 1913. A similar decision was arrived at by a majority in the High Court of Australia in the case of the *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (3), where debentures of a New Zealand corporation had been issued payable in New South Wales, and the question was whether the rate of the interest was reduced under a New South Wales statute, the Interest Reduction Act, 1931, and its amendments. It was held that the debenture was a New Zealand obligation and was not affected by the Act. The case is here referred to merely as a further illustration

(1) [1936] N. Z. L. R. 54.
(2) [1934] A. C. 122.
(3) (1933–34) 50 C. L. R. 581.

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of the practice of validly issuing under the Act of 1913 debentures payable in pounds, but payable in other than New Zealand currency, because not payable in New Zealand. A reference in the argument before their Lordships was made to a case of *Payne* v. *Deputy Federal Commissioner of Taxation* (1), in which there was some discussion of the decision in the *Adelaide* case. (2) The decision of this Board, however, in *Payne's* case (1) throws no light upon the matters at issue here. The only question in that case was whether under the Australian Income Tax Acts an Australian taxpayer who had received assessable income in pounds sterling under English securities was compelled, in bringing sterling income received in England and not remitted to Australia into his income tax returns, to convert it to terms of Australian currency. It was held that he was.

For all these reasons their Lordships are of opinion that the appeal fails, and that the coupons in question are payable in English currency without any allowance for exchange, and so also is the debenture when it falls due, always provided that the bearer exercises the option to be paid in London. They are also of opinion that the claim of the respondents to be paid 13*s.* 1*d.* succeeds. The judgment of the Court of Appeal in New Zealand will accordingly be upheld and the appeal dismissed. Their Lordships will humbly so advise His Majesty.

In accordance with an agreement between the parties, no order is necessary respecting the costs.

Solicitors for the appellants: *Wray, Smith & Halford.*
Solicitors for the respondents: *Dawes & Sons.*

(1) [1936] A. C. 497.

(2) [1934] A. C. 122.

Applied. WELCH v. NAGY [1950] 1 K. B. 455

[PRIVY COUNCIL.]

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MARITIME ELECTRIC COMPANY, LIMITED . . . . APPELLANTS;

AND

GENERAL DAIRIES, LIMITED . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—New Brunswick—Estoppel—Electricity—Supplied by "public utility" company—Compulsory statutory charges—Company's error in computation of accounts—Consumer inadvertently undercharged—Claim to recover balance—Plea of estoppel—Estoppel barred by positive statutory duty to charge and pay at specified rates—Public Utilities Act, R. S. of New Brunswick, 1927, *ss.* 10, 14, 15, 16, 18 *and* 19.

The appellants, a private company which generated and supplied electrical power in the City of Fredericton, New Brunswick, were, however, a "public utility" company within the meaning of the Public Utilities Act, R. S. 1927, of New Brunswick, and were accordingly under a statutory duty to furnish reasonably adequate service and facilities, and were strictly limited, in accordance with filed schedules open to public inspection, as to the rates, tolls and charges which they could make and exact. The respondents, who carried on a dairy business in Fredericton, bought from the appellants electric energy which they used in the manufacture of butter, ice-cream and other milk products. To arrive at the correct amount of electric energy supplied it was necessary to multiply the meter dial reading by ten, but owing to a mistake on the part of the appellants that was not done over a period of twenty-eight months, with the result that during that time the respondents were charged with only one-tenth of the electric energy supplied to them. On a claim by the appellants to recover the balance of nine-tenths :—

Held, that the appellants were not estopped from recovering the sum claimed. The duty imposed by the Public Utilities Act on the appellants to charge, and on the respondents to pay, at scheduled rates, for all the electric current supplied by the one and used by the other could not be defeated or avoided by a mere mistake in the computation of accounts. The relevant sections of the Act were enacted for the benefit of a section of the public, and in such a case where the statute imposed a duty of a positive kind it was not open to the respondents to set up an estoppel to prevent it.

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* *Present :* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD ALNESS, and LORD MAUGHAM.

An estoppel is only a rule of evidence, and could not avail to release the appellants from an obligation to obey the statute, nor could it enable the respondents to escape from the statutory obligation to pay at the scheduled rates. The duty of each party was to obey the law.

The Queen v. *Blenkinsop* [1892] 1 Q. B. 43, and dicta of Lord Cairns in *Burkinshaw* v. *Nicolls* (1878) 3 App. Cas. 1004, 1017, and of Atkin L.J. in *In re a Bankruptcy Notice* [1924] 2 Ch. 76, 97, referred to.

Judgment of the Supreme Court of Canada [1935] Can. S. C. R. 519, reversed.

APPEAL (No. 9 of 1936), by special leave, from a judgment of the Supreme Court of Canada (June 28, 1935), reversing a judgment of the Appellate Division of the Supreme Court of New Brunswick (June 5, 1934), which had affirmed a judgment of Richards J. in the King's Bench Division (March 16, 1934).

The appellants, Maritime Electric Company, Ld., were a private company which sold electrical power in the City of Fredericton, New Brunswick. The company was, however, a "public utility" company within the meaning of the Public Utilities Act of New Brunswick, R. S. 1927, c. 127, and was accordingly under a statutory duty to furnish reasonably adequate service and facilities, and was strictly limited as to the rates, tolls and charges it could make, which must be in exact accordance with filed schedules open to public inspection. The respondents, General Dairies, Ld., who carried on a dairy business in Fredericton and manufactured and sold butter, ice-cream and other milk products, bought electric energy from the appellants. In order to arrive at the correct amount of electric energy supplied it was necessary to multiply the meter dial reading by ten. Through an error on the part of the appellants that was not done, and as a result the respondents were charged for only one-tenth of the electric energy supplied to them during the period December, 1929, to March, 1932. In the action the appellants claimed the balance of nine-tenths, amounting to $1931. The respondents pleaded that the appellants were in the circumstances estopped from recovering that balance. The appellants contended that estoppel was barred or precluded by the provisions of the Public Utilities

Act. Secondly, it was said that, apart from the Act, there could be no estoppel since the representations contained in the monthly statements of account were not intended to induce any course of conduct on the part of the respondents other than the payment of the amounts stated to be due.

The facts appear more fully from the judgment of the Judicial Committee.

Richards J., in the King's Bench Division, decided both points in favour of the appellants, and gave judgment for the sum claimed.

In the Appellate Division (Grimmer A.C.J., Baxter and Le Blanc JJ.) the decision of Richards J. was affirmed.

The judgment of the Supreme Court of Canada, delivered by Dysart J., and concurred in by Duff C.J., Lamont, Cannon and Davis JJ., decided both contentions in favour of the present respondents, and the judgment of the Appellate Division was reversed. The judgment of the Supreme Court of Canada is reported at [1935] Can. S. C. R. 519.

1936. Dec. 14, 15. *Harold Murphy K.C.* and *Frank Gahan* for the appellants. The only point is whether the appellants are estopped from recovering from the respondents the balance of the price of electric energy supplied by reason of their having omitted to charge the respondents for it in the monthly accounts which they rendered. There is no fact in dispute. The error arose from a miscalculation of the proper amount on the basis of the figure shown on the meter. The question of estoppel divides itself into two branches: first, whether the agreed circumstances are such as to create an estoppel at all, apart from any statutory obligation which the appellants are under; and secondly, whether, having regard to the statutory obligations imposed on the appellants, estoppel can in any event lie. [Reference was made to the Public Utilities Act, R. S. 1927, of New Brunswick, c. 127.] This case will turn very much on whether the four propositions of an estoppel in pais laid down in 1875 by Brett J. in *Carr* v. *London & North Western Ry. Co.* (1) remain an exhaustive

(1) (1875) L. R. 10 C. P. 307, 316.

definition on the subject, or whether they have been enlarged. [The four propositions were read, and reference was also made to *Maclaine* v. *Gatty*. (1)] From 1875 to the present time there does not appear to have been any decision casting any doubt upon those four propositions of Brett J. as being a comprehensive statement of the law of estoppel. [Reference was made to *Greenwood* v. *Martins Bank* (2); *The Queen* v. *Blenkinsop*. (3)] The authorities before *Carr* v. *London & North Western Ry. Co.* (4) seem to be illustrations of the principle set out quite clearly in *Carr's* case (4): *Skyring* v. *Greenwood*. (5) [Reference was also made to *Holt* v. *Markham*. (6)]

With regard to the statute point, there is a complete analogy to the legislation contained in the Public Utilities Act, 1927, in the Interstate Commerce legislation of the United States of America. Sect. 16 of the Public Utilities Act imposes an absolute duty to charge and to recover no more and no less than certain amounts for such services as actually are rendered. And until the charges in respect of the further services which were in fact rendered in the present case have been charged and recovered those obligations have not been complied with. In *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink* (7), decided under the Interstate Commerce Act, 1906, the Supreme Court of the United States of America laid down the rule that estoppel could not be invoked to override the provisions of the statute. [Reference was also made to the passage on estoppel in the headnote in *New York, N. H. & H. R. Co.* v. *York & Whitney Co.* (8)]

[LORD MAUGHAM referred to *In re a Bankruptcy Notice*. (9)]

There have been cases in this country on the question whether there can be an estoppel which in any sense overrides a statute, but those cases are not so close as the United States case (7): *Burkinshaw* v. *Nicolls* (10); *York Corporation*

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(1) [1921] 1 A. C. 376.
(2) [1933] A. C. 51.
(3) [1892] 1 Q. B. 43.
(4) (1875) L. R. 10 C. P. 307.
(5) (1825) 4 B. & C. 281.
(6) [1923] 1 K. B. 504.
(7) (1919) 250 U. S. 577.
(8) (1913) 102 N. E. Repr. (Mass.) 366.
(9) [1924] 2 Ch. 76.
(10) (1878) 3 App. Cas. 1004.

v. *Henry Leetham & Sons, Ld.* (1); *Sunderland Corporation* v. *Priestman* (2); *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (3)

Sir Robert Aske K.C. and *W. L. McNair* for the respondents. Bowen L.J. in *In re London Celluloid Co.* (4) said: "If the company has so acted as to preclude itself from denying that the Act of Parliament has been complied with—in other words, if it has estopped itself, that is conclusive evidence that the Act of Parliament has been complied with, as against the company; and in such cases, although the Act of Parliament has not in fact been complied with, yet the company must be precluded from saying that it has not, and must be taken to have conclusively admitted that it has." There are two propositions in respect of estoppel: first, there is the statement of Lord Macnaghten in *George Whitechurch, Ld.* v. *Cavanagh* (5) that he doubts (6) "whether any great advantage is to be gained by endeavouring to reduce it [the doctrine of estoppel] to rules such as those which have been formulated in the case of *Carr* v. *London & North Western Ry. Co.* (7)" Secondly, in *Greenwood* v. *Martins Bank* (8) Lord Tomlin stated the rule of estoppel simply and clearly as follows (9): "The essential factors giving rise to an estoppel are I think: (1.) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made. (2.) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made. (3.) Detriment to such person as a consequence of the act or omission." There is no suggestion in any of the authorities that the representation should be acted upon in a particular way. That the person who makes the representation should intend the consequences is immaterial. In this case, whatever the intention of the appellants may have been, if they so conducted themselves that a reasonable man

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(1) [1924] 1 Ch. 557.
(2) [1927] 2 Ch. 107.
(3) (1887) 18 Q. B. D. 714.
(4) (1888) 57 L. J. (Ch.) 843, 848.
(5) [1902] A. C. 117.
(6) [1902] A. C. 130.
(7) L. R. 10 C. P. 307.
(8) [1933] A. C. 51.
(9) Ibid. 57.

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would take the representation to be true and believed that it was meant that he should act upon it, and he did act upon it as true, then the doctrine of estoppel applies. [Reference was made to *Cornish* v. *Abington.* (1)] The statutory provisions regarding reading meters and rendering accounts amount to a representation on which reliance can be placed. The appellants must take it that the monthly statements would be used in the ordinary purposes of business. [Reference was made to *Sarat Chunder Dey* v. *Gopal Chunder Laha* (2); *Seton* v. *Lafone* (3); *Maclaine* v. *Gatty* (4); *Freeman* v. *Cooke* (5); *Nippon Menkwa Kabushiki Kaisha* v. *Dawsons Bank, Ld.* (6); and *Holt* v. *Markham.* (7)]

With regard to the second point, it is submitted that the statute has no effect whatever on the case as it stands. Sect. 25 of The Companies Act, 1867, seems to create a prohibition at least as positive as the relevant section of the Public Utilities Act now in question, but that did not deprive a party of his right to set up estoppel: *In re London Celluloid Co.* (8); *Webb* v. *Herne Bay Commissioners.* (9)

Murphy K.C. was not called upon to reply.

1937. Feb. 8. The judgment of their Lordships was delivered by LORD MAUGHAM. This is an appeal, by special leave, from a judgment of the Supreme Court of Canada, dated June 28, 1935, reversing a judgment of the Appeal Division of the Supreme Court of New Brunswick. That Court had affirmed a judgment in the King's Bench Division whereby the appellants had recovered against the respondents the sum of $1931.82 and costs.

The appellants are a private company which sells electrical power in the City of Fredericton, New Brunswick. The company is, however, a "public utility" company within the meaning of the Public Utilities Act of New Brunswick (Chap. 127 of the Revised Statutes, 1927). It is accordingly

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(1) (1859) 4 H. & N. 549.
(2) (1892) L. R. 19 I. A. 203.
(3) (1887) 19 Q. B. D. 68, 70.
(4) [1921] 1 A. C. 376, 386.
(5) (1848) 2 Ex. 654.
(6) (1935) 51 Ll. L. Rep. 147.
(7) [1923] 1 K. B. 504, 514.
(8) (1888) 39 Ch. D. 190, 207.
(9) (1870) L. R. 5 Q. B. 642, 651.

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under a statutory duty (s. 10) to furnish reasonably adequate service and facilities. It has annually to make to the Board of Commissioners of Public Utilities established by the Act some elaborate returns. It is strictly limited as to the rates, tolls, and charges which it can make and exact, which must be in exact accordance with filed schedules open to public inspection, and these schedules must remain unchanged until altered, reduced, or modified as provided by the Act (ss. 14 and 15). Sect. 16 is in the following terms: "No public utility shall charge, demand, collect or receive a greater or less compensation for any service, than is prescribed in such schedules as are at the time established, or demand, collect or receive any rates, tolls or charges not specified in such schedules."

By s. 18 it is provided that any public utility company charging or receiving a greater or less compensation for any service rendered than that prescribed as provided by the Act is guilty of "unjust discrimination," which is thereby prohibited, and is made liable to a penalty. By s. 19 no person, firm or corporation "shall knowingly solicit, accept or receive any rebate, concession or discrimination in respect to any service in, or affecting or relating to, any public utility whereby any such service is by any device whatsoever, or otherwise, rendered free or at a less rate than that named in the schedules in force, as provided herein, or whereby any service or advantage is received other than is herein specified."

A penalty is provided for the violation of this section.

The respondents during the material times carried on a dairy business in the City of Fredericton, and manufactured and sold butter, ice-cream and other milk products. They bought electric energy from the appellants. The amount of $1931 claimed by the latter is the amount remaining due for electric energy supplied from the month of December, 1929, to the month of March, 1932, according to the schedules in force during that period. Only $546.28 instead of $2478.10 had been paid. The defence of the respondents is simply that of an estoppel raised on agreed facts of a somewhat singular nature. No viva voce evidence was given at the trial.

It is important to keep closely to the principal facts as agreed, and their Lordships doubt whether it is legitimate or safe to draw any further inference of fact in the existing circumstances. It will be convenient to state the important facts as agreed in a series of paragraphs.

1. The respondents carried on business in the city in buying cream from farmers and others and using the same in the manufacture of butter, ice-cream and other milk products.

2. They paid to the farmers and others from whom the cream was bought a price depending, amongst other things, on the cost of manufacture of the butter, ice-cream and other milk products.

3. The respondents used the electric energy supplied by the appellants for power and other purposes in connection with their manufacture of butter, ice-cream and other milk products, and the cost of such energy entered into the cost of such manufacture and directly affected the price which the respondents paid to the farmers and others for their cream.

4. The appellants at all material times knew that the respondents were using the electric energy in their manufacture, and they rendered to the latter each month a statement purporting to show the amount of electric energy supplied to the latter, purporting to be based on the reading of the meter placed by the appellants on the respondents' premises for the purpose of registering the energy so supplied.

5. The respondents believed the statements so rendered to be true and in accordance with the reading of the meter, and they from time to time paid to the appellants the amounts shown by such statements.

6. The respondents used the amounts so paid as part of their cost of manufacture of butter, ice-cream and other milk products in determining the cost of manufacture for the purpose of fixing the price so to be paid for the said cream, and the respondents did base thereon the amount which they paid to the farmers and others for the said cream.

7. The mistake in rendering the said statements showing incorrect amounts to be due was the mistake of the appellants.

8. The respondents acted upon the said statements so rendered believing the same to be true.

9. By reason of such belief the respondents paid to the farmers and others large sums of money more than they would or could have paid for the said cream if the amounts now claimed for electric energy had been rendered to and claimed from the respondents at the several times when the said statements were rendered by the appellants.

These remarkable facts, involving as they do the long-continued undercharging of the appellants to so serious an extent, are to some extent explained by the following admitted circumstance. The meter was accurate and conformed with the statutory requirements ; but in order to arrive at the correct amount of electric energy it was necessary to multiply the dial reading by ten. Through error this was not done, and as a result the respondents were charged with only one-tenth of the electric energy supplied to them. Thus the first statement rendered, that of December 18, 1929, showed 106 k.w.h. This was a correct reading of the dial, but to obtain the actual amount of energy used the reading should have been multiplied by ten, making 1060 k.w.h. For this the correct charge according to the schedules would be $44.50 instead of the minimum fee of $15. The same error was made in compiling every one of the statements up to March 16, 1932.

To the plea of estoppel two objections were raised by the appellants. First, it was contended that, apart from any other reason, estoppel was barred or precluded by the provisions of the Public Utilities Act. "A party," it was contended (citing 13 Halsbury, 2nd ed., p. 474, s. 542), "cannot by representation, any more than by other means, raise against himself an estoppel so as to create a state of things which he is under a legal disability from creating." Secondly, it was contended that (apart from the statute) there could be no estoppel since the representations contained in the monthly statements were not intended to induce any course of conduct on the part of the respondents other than the payment of the amounts stated to be due. On this point great reliance was placed by the appellants on the well known and often cited

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propositions relating to estoppel in pais laid down in 1875 by Brett J. (afterwards Lord Esher) in the case of *Carr* v. *London & North Western Ry. Co.* (1) It was urged that the representation relied on as founding the estoppel must be one intended or calculated to bring about the particular course of conduct which was the cause of detriment to the party relying on the estoppel.

Either of these contentions, if sound, would suffice to defeat the estoppel and to entitle the appellants to judgment. Richards J., in a careful judgment in the King's Bench Division of the Supreme Court of New Brunswick, decided both points in favour of the appellants, and gave judgment for $1931.82 and costs. In the Appellate Division this judgment was confirmed by Baxter J. and Grimmer A.C.J. on the second of the two grounds above stated, Le Blanc J. intimating a doubt as to whether the result might not have been different if negligence on the part of the present appellants (which had not been pleaded) had been alleged.

When the matter came on appeal before the Supreme Court of Canada another view was taken, and Dysart J. delivered the judgment of the Court (concurred in by Duff C.J. and Lamont, Cannon and Davis JJ.) deciding both the contentions in favour of the present respondents and therefore accepting the plea of estoppel, with the result that the appeal was allowed and the judgment reversed and set aside with costs in all the Courts.

In the view of their Lordships, assisted by able and exhaustive arguments by counsel on both sides, the two points are of considerable difficulty and importance. It will be convenient to deal in the first place with the contention based on the statute. The problem cannot be more admirably put than as it was stated by Dysart J. He said (2): " Applied to the present case, the Act imposes a duty on the Electric Company to charge, and on the Dairy Company to pay, at scheduled rates, for *all* the electric current supplied by the one and used by the other, during the twenty-nine months in question. The specific question for determination here is, can the duty so cast by statute upon both parties to this action, be defeated or avoided by a mere mistake in the computation of accounts ? "

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(1) L. R. 10 C. P. 307, 316.

(2) [1935] Can. S. C. R. 523.

In the view of their Lordships the answer to this question in the case of such a statute as is now under consideration must be in the negative. The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense. In such a case—and their Lordships do not propose to express any opinion as to statutes which are not within this category—where, as here, the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action ; it cannot therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law. To hold, as the Supreme Court has done, that in such a case estoppel is not precluded, since, if it is admitted, the statute is not evaded, appears to their Lordships, with respect, to approach the problem from the wrong direction ; the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision.

A similar conclusion will be reached if the question put by the learned judge is looked at from a somewhat different angle. It cannot be doubted that if the appellants, with every possible formality, had purported to release their right to sue for the sums remaining due according to the schedules, such a release would be null and void. A contract to do a thing which cannot be done without a violation of the law is clearly void. It may be asked with force why, if a voluntary release will not put an end to the obligation of the respondents, an inadvertent mistake by the appellants acted upon by the respondents can have the result of absolving the appellants from their duty of collecting and receiving payment in accordance with the law. To collect the money due will, in one sense, cause loss or injury to the respondents, to the extent of $1931.82. Their Lordships do not know, because the admission (No. 9 above) does not cover the point, whether to allow the estoppel will not leave the respondents with an advantage consisting of the difference between the sum of $1931.82 and the total amount by which the respondents were led to increase their payments of cream to farmers and others. It is, however, clear that to disallow the estoppel will leave the respondents out of pocket to the extent of the increased amounts just referred to. It is an unfortunate result; but the obligation to obey a positive law is more compelling than a duty not to cause injury to another by inadvertence. In the present case it may be observed that the injury is not a cause of action. Their Lordships are unable to see how the Court can admit an estoppel which would have the effect pro tanto and in the particular case of repealing the statute.

If we now turn to the authorities it must be admitted that reported cases in which the precise point now under consideration has been raised are rare. It is, however, to be observed that there is not a single case in which an estoppel has been allowed in such a case to defeat a statutory obligation of an unconditional character. The text-books have regarded the case as one closely analogous to the cases of high authority where it has been decided that a corporation could not be estopped from contending that a particular act was ultra vires. Their Lordships propose to deal briefly with the more relevant authorities. In *The Queen* v. *Blenkinsop* (1) a municipal body under a mistake of law had sent demands to a railway company for only one-third of the sums legally due. The error continued for four successive years. In the

(1) [1892] 1 Q. B. 43.

fifth year the overseers took steps to recover the amounts unpaid. The company set up an estoppel based on the contention that the company had acted on the statements sent to them and had paid out the money in dividends; but the estoppel was disallowed. In *Anctil* v. *Manufacturers' Life Insurance Co.* (1) a question arose in reference to a condition in a policy of life assurance which provided for the policy becoming incontestable on any ground if the same should have been in force for a year, the premiums having been promptly paid. The policy was attacked on the ground of a lack of insurable interest within the meaning of the Civil Code of Lower Canada. The condition was relied on, and estoppel was pleaded, but was not allowed. Lord Watson, in delivering the judgment of the Privy Council, observed on this point, concurring in the opinion expressed by the majorities of the Supreme Court of the Superior Court sitting in review (2): "The rule of the Code appears to them" [i.e. their Lordships] "to be one which rests upon general principles of public policy or expediency, and which cannot be defeated by the private convention of the parties."

More recently (*In re a Bankruptcy Notice* (3)) a similar point arose in reference to the Deeds of Arrangement Act, 1914. The main question was whether a party could be estopped by a letter of assent acted upon by the recipient from contending that a certain agreement was void for want of registration. Various points were involved, but it is to be noted that Lord Atkin (then Atkin L.J.) remarked (4): "Whatever the principle may be" [referring to a contention as regards approbation and reprobation], "it appears to me that it does not apply to this case, for it seems to me well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid."

A statement made by Lord Shaw of Dunfermline in

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(1) [1899] A. C. 604.
(2) Ibid. 609.
(3) [1924] 2 Ch. 76.
(4) Ibid. 97.

Bradshaw v. *M'Mullan* (1) supports the same view. It should be added that as regards estoppel by deed it was long ago held that if the deed were executed in contravention of a statute there could be no estoppel. The leading case is *Doe d. Chandler* v. *Ford.* (2)

The Supreme Court appear to have attached great, if not decisive, weight to the decisions of English Courts in relation to the Companies Acts, and in particular in relation to the effect of s. 25 of the Companies Act, 1867. That unfortunate section led to much injustice and was finally repealed in 1900; but it was not so worded as to cause the disastrous results which would have followed from a decision that the section precluded a purchaser in the market of shares purporting to be fully paid by certificates under the seal of the company from relying on the certificates. The leading case was that of *Burkinshaw* v. *Nicolls* (3), and Lord Cairns L.C. in making the leading speech was careful to point out that the purchaser of the shares was not violating the terms of the statute. Lord Cairns observed as follows (4): "He comes before the Court not in any way affecting to break in upon the enactment which I have read. He says, 'I bow to the words of the enactment. I have not in any way attempted to interfere with it, but I have taken, in the course of business, a share, in regard to which I have the representation of the company that that section has been complied with.'"

Lord Cairns went on to point out that the whole of the dealings with shares in public companies would be paralysed if, a share being dealt with in the ordinary course of business in the market with a representation upon the certificate by the company that the whole amount of the share had been paid, the purchaser was bound to disregard the assertion of the company and must embark on what might be a most difficult investigation as to the mode in which the section had been complied with.

It is therefore plain that the House of Lords decided the case on the view that the estoppel in question was not an attempt in any way to break in upon the terms of the enactment. In the later cases such as *Bloomenthal* v. *Ford* (1) the contrary was not even suggested. In comparing the facts of the present case and those which existed in *Burkinshaw* v. *Nicolls* (2) it may be desirable to note that in the present case, as above pointed out, the appellants are acting in direct violation of the statute if they do not collect and receive from the respondents the amount remaining due, whilst in the latter case a duty was not imposed on the company under s. 25 to recover in cash from the shareholder the full amounts of the shares in cash. It must be remembered that the amounts paid up on shares generally depend on calls duly made, and that shares are constantly transferred from one shareholder to another. In these circumstances s. 25 makes no attempt to affix a duty upon the company to exact payment from specific shareholders. In truth, the position of a shareholder is very widely different from that of a purchaser of electric energy who is bound by such as statute as the Public Utilities Act of New Brunswick.

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(1) [1920] 2 I. R. (H. L.) 412, 425.

(2) (1835) 3 A. & E. 649.

(3) 3 App. Cas. 1004.

(4) Ibid. 1017.

Their Lordships having thus arrived at the conclusion that estoppel is not open to the respondents for these reasons, which are in effect the same reasons as those given by Richards J. in the King's Bench Division on this part of the case, it becomes unnecessary for them to express an opinion as to the other ground on which the appellants have challenged the estoppel. As above pointed out, the agreed facts are of a very unusual character, and the diligence of counsel was unable to find any authority in which the invalidity of an estoppel was held to turn on the circumstance that the course of conduct induced by the representation was not that intended to be caused by the person making the representation. The question must to a great extent turn on a consideration of the numerous authorities referred to in the Canadian Courts. On the whole, it seems to their Lordships that the wiser course will be to leave this part of the case undecided so far as they are concerned, and they propose to express no opinion on it.

(1) [1897] A. C. 156.

(2) 3 App. Cas. 1004.

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For the reasons above given their Lordships are of opinion that the appeal succeeds, and that the judgment of the Appeal Division of the Supreme Court of New Brunswick and of Richards J. ought to be restored, with costs here and below. Their Lordships will humbly so advise His Majesty.

Solicitors for the appellants: *Charles Russell & Co.*
Solicitor for the respondents: *Edward D. K. Busby.*

[PRIVY COUNCIL.]

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MACLEAY . . . . APPELLANT;

AND

TREADWELL AND ANOTHER. . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Will—Devise of real estate—To " heir-at-law " of named survivor—Common law " heir-at-law " not extinguished—Capable of identification—Construction—Real Estate Descent Act, N.Z., No. 84 *of* 1874, *ss.* 3, 18—*Administration Act, N.Z., No.* 49 *of* 1879, *ss.* 6, 10, *sub-ss.* 1, 2, 5—*Administration Act, N.Z., No.* 3 *of* 1908, *ss.* 4, 11.

The testator, who at the date of his death, childless, in 1895, was resident and domiciled in New Zealand, by his will, made in 1891, devised all his real estate " whatsoever and wheresoever " to trustees for the benefit of a brother and the eldest son of that brother during their joint lives and the life of the survivor, and then directed it at the expiration of twenty-one years after the death of the survivor to be conveyed and transferred absolutely to " the heir-at-law of such survivor his heirs and assigns." The whole of the testator's real estate consisted of a farm of 500 acres in New Zealand :—

Held, first, that the heir-at-law named in the will was the heir-at-law constituted by the law of New Zealand, where the basic law of succession to real estate was the old common law of England as modified in 1833 by the Inheritance Act.

Held, secondly, that notwithstanding anything contained in the provisions of the three New Zealand statutes, the Real Estate Descent Act, 1874, the Administration Act, 1879, which repealed the Act of 1874, and the Administration Act, 1908, a consolidation statute, which introduced in New Zealand a new rule of succession to real estate by which in cases of intestacy realty was to be administered and was to devolve precisely like personalty, the common law heir-at-law had not been extinguished in New Zealand, but still survived there with definite rights and privileges appertaining to his status, and remained an heir capable of being ascertained and identified as easily as before the passing of the above legislation.

The appellant, the eldest son of the testator's nephew who, in the events which happened, became the survivor named in the will, was therefore the " heir-at-law of such survivor " and as such entitled to the whole of the testator's real estate.

Larkin v. *Drysdale* (1875) 1 V. L. R. (L.) 164, approved.

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* *Present :* LORD BLANESBURGH, LORD MAUGHAM, LORD SALVESEN, SIR JOHN WALLIS, and SIR LANCELOT SANDERSON.

Morrice v. *Morrice* (1893) 14 N. S. W. R. Eq. 211, referred to. Judgment of the Court of Appeal of New Zealand [1935] N. Z. L. R. 463, reversed.

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APPEAL (No. 41 of 1936) from a judgment of the Court of Appeal of New Zealand (July 5, 1935) upon an originating summons for the interpretation of the will of John Macleay, who died on June 26, 1895, resident in and domiciled in New Zealand.

By his will, made in 1891, after appointing trustees and executors, he devised all his real estate unto his trustees "upon trust to pay the rents profits and emoluments thereof to my said brother Alexander and his said son John in equal shares for their absolute use and benefit and upon the death of either of them my said brother and nephew upon trust to pay the whole of the said rents profits and emoluments to the survivor for his absolute use and benefit And upon further trust at the expiration of twenty-one years after the decease of such survivor to convey and transfer the whole of my real estate absolutely to the heir-at-law of such survivor his heirs and assigns the true intent of this my will being that the heir-at-law of such survivor shall ultimately take the whole of the corpus of my real estate And upon further trust until such conveyance and transfer to pay the said rents and profits and emoluments after the death of such survivor to such heir-at-law for his absolute use and benefit. . . ."

The will was proved by the executors on July 5, 1895. The testator's brother Alexander and his nephew John Leed Macleay both survived him. The father, Alexander, died first, and the son and "survivor" died on July 6, 1931. He had been twice married, and he left surviving him his second wife, with sons and daughters of both marriages, seven in number. The appellant was the eldest son, and he asserted that he was the "heir-at-law" of the survivor referred to in the will, and he claimed an immediate conveyance of the whole of the real estate, consisting of a farm at Wanganui of 500 acres and of 6000*l.* in value, to himself. The contention of the statutory next of kin other than the appellant was that the term "heir-at-law" should be construed to mean

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the persons who would be entitled under the Administration Act, 1879, to any real estate of an intestate, and that accordingly all of them collectively were in the event the "heir-at-law" to whom the testator referred. To have the matter determined the trustees, on January 24, 1935, took out an originating summons asking the following questions: "(1.) Who is, or are, the person or persons now entitled to succeed to the real estate of the said John Macleay deceased—[the testator]? (2.) Whether the person or persons so found to be entitled to succeed are entitled to a conveyance from the trustees immediately or at the expiration of twenty-one years from the death of the survivor of the brother and nephew of the testator?"

The material provisions of the will and the relevant sections of the statutes appear from the judgment of the Judicial Committee.

The above questions, by an order of the Supreme Court, were removed into the Court of Appeal for determination. That Court (Smith, Johnston and Fair JJ., Myers C.J. and Reed J. dissenting) answered the questions as follows: (1.) The estate in fee simple in the testator's real estate is held by the testator's executors upon trust for the persons who would, under the Administration Act, 1908 [which re-enacted substantially the relevant provisions of the Administration Act, 1879] have taken any real estate of the survivor of Alexander Macleay and John Leed Macleay if such survivor had died intestate. (2.) The parties entitled take not as joint tenants but as tenants-in-common. The appeal is reported at [1935] N. Z. L. R. 463.

The appellant, as eldest son of the survivor, now appealed.

1936. Oct. 29, 30. *Fergus Morton K.C.* and *G. P. Slade* for the appellant. The only question in this appeal is, what is the meaning of a gift of land in New Zealand to the heir-at-law of the survivor of two men residing in Scotland, his heirs and assigns? The matter depends primarily on the wording of the will and the surrounding circumstances. [The material provisions of the will were read.] It is submitted that the testator had in mind an individual whom he ultimately wished to take his real estate as a whole. It is clear that the common law heir-at-law is the same in New Zealand as in England. Having regard to the language used in the will and to the surrounding circumstances the question is, to whom did the testator intend to give this property? The appellant's answer is that it is he who is intended, being the heir-at-law of the survivor according to the common law of New Zealand and of England, and, so far as material, of Scotland. The respondents say that by reason of the relevant statutory provisions the gift must be deemed to pass to a class consisting of the persons who under the relevant New Zealand Statutes are entitled to succeed to the estate of a person who dies intestate. Decided cases on differently worded wills are not of great assistance, but there are three propositions which appear from the authorities: (1.) There is nothing in the law of New Zealand which prevents a testator from devising real estate to the common law heir as persona designata. (2.) Although the descent on intestacy of realty and personalty was assimilated in New Zealand in 1874, yet the word "heir-at-law" continued to be used in New Zealand as meaning the common law heir. (3.) There is no case in which a gift of realty to the heir-at-law, even without any context, has been held to give the property to the statutory class of next of kin. The wording of the will points to the common law heir taking on the death of the survivor. [Reference was made to *Morrice* v. *Morrice* (1); *Garland* v. *Beverley* (2); *MacNamara* v. *MacNamara* (3); *Re Crane* (4); *In the Will of Wright deceased* (5); *In the Will of John Connell* (6); *In re Gundry* (7); *Matheson* v. *Atkinson* (8); *Shaw* v. *Medley* (9); *In re Hussey and Green's Contract* (10); *In re Ethel and Mitchells and Butters' Contract* (11); and *In re Knowles: Brown* v. *Knowles* (12). *Morrice* v. *Morrice* (1) does not govern the present case. "Heir-at-law" still means the same in New Zealand as it always has done. It is submitted that the summary of the effect of the authorities as set out in the judgment of Reed J. (1) is perfectly accurate, as also are his observations. Reliance is also placed on the dicta of Stephen J. in *Larkin* v. *Drysdale* (2), where he said: "The heir-at-law is not extinguished yet; and any attempt to extinguish him might have very startling consequences, his position being so bound up with the law of real property." (3) [Reference was also made to *In re George Chapman* (4).] It is not necessary to overrule *Morrice* v. *Morrice* (5) to succeed in the present case. The argument falls under two heads. First, even if there had been a gift simply to the heir-at-law of the survivor in this will, and no other context, it being a gift of realty, the decision of the Court ought to have been in favour of the appellant, and that is the proper interpretation of the words of the will. There is no authority in all those referred to by the judges in which "heir-at-law" as applied to realty has been held to pass the property to the statutory next of kin. And secondly, even if that be wrong, and the words "heir-at-law" of the survivor per se would not be enough to indicate the appellant, there is ample context to show that he and not these statutory next of kin is the person whom the testator intended to take. The appeal should be allowed.

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(1) 14 N. S. W. R. Eq. 211.
(2) (1878) 9 Ch. D. 213.
(3) (1929) 30 N. S. W. S. R. 245.
(4) (1908) 8 N. S. W. S. R. 132.
(5) (1922) V. L. R. 41.
(6) (1910) V. L. R. 471.
(7) (1892) 11 N. Z. L. R. 444.
(8) (1906) 26 N. Z. L. R. 145.
(9) (1909) 28 N. Z. L. R. 397.
(10) [1921] 1 Ch. 566.
(11) [1901] 1 Ch. 945.
(12) [1916] N. Z. L. R. 83.

G. P. Slade followed. A statute is not to be deemed to affect common law rights more than is to be found in its express terms. On the construction of the intestacy statutes in this case it is submitted that there is not in the language of any of them anything sufficient to dispossess the common law right of the heir until the moment when a personal representative is constituted. *Larkin* v. *Drysdale* (2) is a direct decision, made at a time when there was in force a statute with precisely the same corresponding effect as in this case, that notwithstanding that statute the heir-at-law was not extinguished, and that he might, and did, take the legal estate in cases of intestacy until grant of administration. There appears to be no authority in New Zealand, Australia or England which disapproves of *Larkin* v. *Drysdale* (1), but there are two dicta which are in pari materia: *John* v. *John* (2); *In re Griggs. Ex parte School Board for London.* (3)

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(1) [1935] N. Z. L. R. 485.
(2) (1875) 1 V. L. R. (L.) 164.
(3) Ibid. 166.
(4) (1913) S. A. L. R. 173.
(5) 14 N. S. W. R. Eq. 211.

Hon. S. O. Henn Collins K.C., *George W. Currie* and *Stanton* (both of New Zealand) for the respondents. There is no authority, apart from the case now under discussion, which deals directly with the term "heir-at-law"; but there is a long train of authority in Australasia which does show that words such as "heir," "heirs," "right heir" retain in themselves a reference to a local code of law. However it is looked at, the term "heir-at-law" when realty is being dealt with is necessarily in this case not an indication of a person: it is submitted that it is a misconception so to regard it, but it is a convenient phrase referring to a system of law by which the identity of the person can be ascertained. Given the proper expansion reference is not being made in any true sense to a particular person in using the term "heir-at-law" in relation to realty, but to a particular law by which he is to be ascertained. To ascertain who succeeds on an intestacy reference must be made to some code of law. In England it has to be a reference to the English code. If "heir-at-law" means heir-at-law as ascertained by English law, then this appeal succeeds. But the question is whether in the mind and writing of the testator that is what it meant. In a case where there is no context—where the testator has supplied no dictionary—it is submitted that in a will made in New Zealand dealing with New Zealand property, prima facie it means the heir-at-law as ascertained by the local law of New Zealand. "Heir-at-law" is a technical term, and when it is expanded it is found that inherent in it there is a reference to a code of law. The particular code applicable from time to time changed. It was changed by the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), and what has been conveniently called the common law heir is a person ascertained by the

(1) (1875) 1 V. L. R. (L.) 164.
(2) [1898] 2 Ch. 573, 576.
(3) [1914] 2 Ch. 547, 552.

common law and the Inheritance Act, and from and after the passing of that Act the term "heir-at-law" in English usage inherently contained a reference to that Act. So when the term is used and applied in New Zealand it inherently refers to a code in New Zealand. Has the testator supplied a sufficient contrary indication so that the Court is driven to the conclusion that he meant the English law? It is submitted that he has not. A consequential effect of the passing of the Real Estate Descent Act, 1874, in New Zealand was to alter the common law of New Zealand so as to render redundant, or otherwise to amend, the meaning theretofore attaching to the term "heir-at-law." At the time the testator made his will the use by him of the term "heir-at-law" should be construed to mean the persons who would be entitled under the Administration Act, 1879, to any real estate of an intestate. [Reference was made to *Larkin* v. *Drysdale*. (1)]

Fergus Morton K.C. replied. In New Zealand up to 1874 the word "heir-at-law" could only designate one person. In 1874 the law of descent on intestacy was altered, but the word "heir-at-law" and the meaning of it underwent no change, except that it referred to a person who had been disinherited, but he still remained in being. After 1874 in ordinary parlance "heir-at-law" did not refer to the people entitled to succeed under the new statute, but to the heir-at-law who formerly inherited the real estate; it is clear from the authorities that "heir-at-law" was still used after 1891 as meaning this same person: *Haslett* v. *Lynch* (2); *Hillier* v. *Hiscock*. (3) [Reference was also made to *Shaw* v. *Medley*. (4)]

1937. Feb. 12. The judgment of their Lordships was delivered by LORD BLANESBURGH. John Macleay, of Wanganui, in the Province of Wellington, farmer, a Highland Scot by origin and probably also by birth, at the time of his death in 1895 was resident and, as has been assumed, domiciled in the Dominion of New Zealand. By a will, in

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(1) (1875) 1 V. L. R. (L.) 164.
(2) (1889) 15 V. L. R. 713, 716.
(3) (1900) S. A. L. R. 1.
(4) (1909) 28 N. Z. L. R. 397.

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1891, he made provision for different collateral members of the Macleay family, still resident in the Highlands of Scotland —(he appears to have had no children of his own)—and the question now at issue relates to a devise of all his real estate "whatsoever and wheresoever" thereby made to trustees for the benefit of a brother and his eldest son during their joint lives and the life of the survivor, and then after twenty-one years to be conveyed and transferred absolutely to "the heir-at-law of such survivor his heirs and assigns." Who within the intendment of the will is that "heir-at-law"? Is he a persona designata—in point of fact the appellant, as the eldest son of the survivor lately deceased? Or, is the expression, in this will, a nomen collectivum, signifying a class to be referred to in what follows as the survivor's statutory next of kin—composed of persons who, as a result of modern New Zealand legislation with reference to the succession to real estate in the Dominion, would be entitled to succeed in an administration in intestacy to any New Zealand real estate of his own of which the "survivor" might have died possessed. The question, one, as will be found, of pure construction, can only be approached effectively after the provisions of the will as a whole have been reviewed, and after the words immediately in debate have been seen in the setting in which they there are found, due regard being had to the effect, if any, of the legislation referred to upon the meaning otherwise attributable to them. To the will, therefore, their Lordships at once turn.

It is dated September 11, 1891. It opens with the gift of a legacy of 50*l.* to each of the children of the testator's sister Kate "now or lately residing near Wingwall in Rossshire in Scotland": then follow legacies of a like amount to a daughter of the testator's sister Ann "also now or lately residing near Wingwall aforesaid," and to a son of the testator's brother Donald—in his case, by way of exception, with no reference to the place of residence of either son or father.

The will then proceeds: "I give, devise and bequeath all the rest of my personal estate whatsoever and wheresoever unto my brother Alexander Macleay and his son John both now or lately residing near Wingwall aforesaid for their absolute use and benefit in equal shares."

Thereupon follows the devise now in question: "I give and devise all my real estate whatsoever and wheresoever unto Archibald McDonell of Kauangaroa in the said Provincial District, farmer and Donald Stewart of Wanganui aforesaid farmer who with their heirs executors administrators and assigns are hereinafter called my trustees upon trust to pay the rents profits and emoluments thereof to my said brother Alexander and his said son John in equal shares for their absolute use and benefit and upon the death of either of them my said brother and nephew upon trust to pay the whole of the said rents profits and emoluments to the survivor for his absolute use and benefit. And upon further trust" [and now is reached the provision upon which the present question arises] "at the expiration of twenty-one years after the death of such survivor to convey and transfer the whole of my real estate absolutely to the heir-at-law of such survivor his heirs and assigns the true intent of this my will being that the heir-at-law of such survivor shall ultimately take the whole of the corpus of my real estate. And upon further trust until such conveyance and transfer to pay the said rents and profits and emoluments after the death of such survivor to such heir-at-law for his absolute use and benefit And I empower my said trustees to lease my said real estate or any part thereof from time to time at their discretion at such rent as may be obtained therefor without fine premium or foregift for any term not exceeding twenty-one years to take effect in possession on such terms as they may think proper."

And the testator appointed these named New Zealand trustees to be the executors of the will.

A summary statement of subsequent events may conveniently precede the consideration of these provisions. The testator died on June 26, 1895. On July 5 following his will was proved by the executors. In 1913 they retired from the trusteeship, and the respondents William James Treadwell and George Stannard Gordon were duly appointed trustees of the will in their place, and have since acted in the trusts thereof. The testator's brother Alexander and his nephew John—the full name of the nephew was John Leed Macleay —both survived him. Of these Alexander, the father, was the first to go. John Leed, the son and "survivor," died on July 6, 1931. He had been twice married, and he left surviving him his second wife, with sons and daughters of both marriages, seven in number. Three of these children in 1935 were still infants. The youngest of them is now deceased. The appellant is the eldest son. He asserts that he is "the heir-at-law" of the survivor referred to in the testator's will, and he claims an immediate conveyance of the whole real estate to himself. The rival contention of the statutory next of kin other than the appellant is that all of them collectively are in the event the "heir-at-law" to whom the testator in the will referred, and as such are now entitled to the testator's real estate in the proportion of one-third to the widow of John Leed Macleay and two-thirds to his children who survived him.

The appellant's claim was not accepted by his immediate relatives, and in order to have determined the question which it raised the trustees, on January 24, 1935, issued from the Supreme Court of New Zealand the originating summons out of which this appeal emerges. The appellant was cited as defendant, and following an order made in the proceedings the summons was served upon the respondent Mr. G. W. Currie as representing the statutory next of kin of John Leed Macleay other than the appellant, his eldest son.

The questions propounded by the summons were as follows:

"1. Who is, or are, the person or persons now entitled to succeed to the real estate of the said John Macleay deceased—[the testator]?

"2. Whether the person or persons so found to be entitled to succeed are entitled to a conveyance from the trustees immediately or at the expiration of twenty-one years from the death of the survivor of the brother and nephew of the testator?"

These questions, by an order of the Supreme Court of February 16, 1935, were removed into the Court of Appeal for determination, and that Court, after full argument, by a majority of three learned judges to two—these latter accepting the contentions of the appellant—answered the first in favour of the statutory next of kin and caused that answer to be embodied in an order of the Court, dated July 5, 1935. It is from that order containing in effect a deliverance in the sense stated—the actual terms of the order will be considered later—that the eldest son now appeals. The second propounded question has ceased to be a matter of contest. For the moment it may, along with its answer, be left alone.

Returning now to the will of the testator in order to ascertain from its terms who is the "heir-at-law" selected by him as the ultimate devisee of his real estate, the first inquiry, it would seem, should be directed to the question what is the system of law under which that "heir-at-law" is to be constituted. And such an inquiry might well have been a difficult one. The real estate, the subject of the devise, is all the testator's real estate, whatsoever and wheresoever—that is to say, beyond quite as much as within New Zealand. A single heir-at-law is the devisee of the whole—but there is no indication given of the country by whose law, be he one person or many, that heir-at-law is to be constituted. It seems clear from the will that at its date the law of New Zealand was not the personal law either of Alexander or of John Leed Macleay. It may, perhaps, be hazarded that the law of Scotland was then the personal law of both, and had the testator died possessed of Scottish real estate only, or of Scottish as well as of New Zealand real estate, it might have been difficult indeed to determine whether it was the Scots heir-at-law or the New Zealand heir-at-law of the survivor who was named by the testator as devisee. And the difficulty would have been enhanced by two considerations never throughout this case to be lost sight of: the first, that it was open to the testator by the law of New Zealand to devise his real estate there to any one it pleased him to select and identify by any title or description: and the second, that the heir-at-law of the survivor named by the testator took nothing in his character of heir-at-law, that expression in this will being no more than the label by which might be identified the beneficiary selected to take by direct gift from himself his, the testator's, real estate all over the world but no property of the "survivor's" anywhere.

But these, and other difficulties easily suggested, are, it is found, met by the fact that, whatever may have been the position at the date of the will—and in this respect it may be assumed perhaps to have remained unaltered when he died, all the testator's real estate at his death was situate within New Zealand. Indeed, it consisted of no more than his farm at Wanganui of 500 acres in area and of 6000*l.* in value.

It is therefore only to New Zealand real estate that the devise, notwithstanding its complete generality, actually attaches, and when to that are added the accepted assumption that the testator himself died domiciled in New Zealand, and the facts that his devisees in trust were both New Zealanders, and that the "survivor" would at his death be, under the will, tenant for life of this New Zealand property and possibly be himself in occupation, it becomes on construction sufficiently clear, whatever may have been the testator's own view, if he had any, that the New Zealand heir-at-law of the survivor and no other must be taken to have been the heir selected by him as ultimate devisee. The only consideration remaining to bar that conclusion, namely, that at the date of the will the law of New Zealand was not, in the view of the testator, the survivor's personal law, cannot in any Court of construction successfully withstand these opposing considerations. Indeed, their Lordships have dealt with this question at length not so much because in the result the answer to it is doubtful, as because by the inquiry made they have been enabled to disclose, and this, it will be seen, becomes important in the sequel—that these considerations on this point, separately or collectively, balanced by counter-considerations or the reverse, are merely pointers to the true meaning of the testator's words, the only problem for solution in this case, and a problem, be it said at once, to be solved with no permissible judicial preference for one solution over another.

Interpreting now the will of the testator armed with the finding that the heir-at-law there named is the heir-at-law constituted by the law of New Zealand, the next step in construction is not contested in any quarter. It is agreed that had the testator's will been executed in 1874, before the passing of the statute of that year to which reference will immediately be made, the heir-at-law of the survivor therein referred to must have been the appellant as his eldest son, and that that must still in New Zealand be the effect of the will unless, on construction, that effect in the case of a will made after it was passed is displaced by the legislation of 1874 and an Act of 1879 which superseded it.

The basic law of succession to real estate in New Zealand is the old common law of England as modified in 1833 by the Inheritance Act. That Act (3 & 4 Will. 4, c. 106) is part of the law of New Zealand, and, except as modified by any subsequent Dominion enactment, remains in force in New Zealand to-day. It has never been there repealed. But it is said that the New Zealand legislation just referred to by which, as in the different States of Australia, a new rule of succession to real estate has been introduced, so that in cases of intestacy realty is to be administered and is to devolve precisely like personalty, has in that Dominion operated to deprive of its content the term " heir-at-law " as theretofore in use. In the absence of some controlling context to the contrary the effect of the legislation has been, so it is said, to attach to that expression when found in a will, say of 1891, the signification which before that legislation would have attached to the expression " statutory next of kin." In a New South Wales case, which has been much discussed—*Morrice* v. *Morrice* (1) Owen C.J., referring to analogous legislation in that State, asked (2) : " Can it really be said that there exists such a person as an heir-at-law in this Colony ? " and the answer to that question, as applied to New Zealand, and given by the majority in the Court of Appeal, in the present case is in the negative. In New Zealand these learned judges hold there is in its old signification no longer any heir-at-law at all. In the vocabulary of the law, and as a term of art too, the expression still survives, but in meaning and content it is now, apart from a sufficient context, the equivalent of the expression statutory next of kin.

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(1) (1893) 14 N. S. W. R. Eq. 211.

(2) Ibid. 213.

This is the real basis of their judgment in favour of these next of kin here, and their Lordships accordingly proceed to examine the legislation referred to in order to ascertain what foundation is there to be found for an assertion as far reaching as it is novel—no authority apart from the rhetorical question of Owen C.J. (1) in New South Wales being adduced in its support.

The relevant sections of the legislation in question are to be found in the Real Estate Descent Act, 1874, the Administration Act, 1879, and the Administration Act, 1908. It will be convenient for facility of reference to collect these. They are not lengthy.

Sect. 3 of the Act of 1874 is as follows: "All land in New Zealand of which any person to whom this Act applies shall die seized or possessed as owner without devising the same, or which he shall only partially devise, shall, with all powers privileges and rights of action attaching or relating thereto, go and pass to and become vested in the personal representative of the person so dying, if undevised absolutely, or if partially devised then subject to such partial devise; and such personal representative shall hold the said land and the unapplied proceeds thereof for division or distribution in like manner as is now the case with chattel real property, and such land shall be distributable and disposable in like manner as other personal assets, without distinction as to order or application in the payment of debts or otherwise: Provided that mortgages trusts and equities upon or affecting such lands shall be as valid as if the said lands had descended to the heir-at-law."

Sect. 18. "In the reading and construction of all Acts of Parliament, and of all deeds and documents that shall from time to time, after the day on which this Act shall come into operation, subsist and be in force, the word 'heir' or 'heirs,' so far as relates to the deceased owners of undevised or

(1) (1893) 14 N. S. W. R. Eq. 213.

partially devised lands shall be taken to mean and include the person to whom letters of administration of the personal estate or probate of the will of such deceased owner, where such will only partially devises his lands, or only affects personal estate, shall be granted, and any person who shall take any lands by virtue of this Act shall so take as if the same had come to him by will of the deceased owner."

"THE ADMINISTRATION ACT, 1879.

"[This Act repealed the Real Estate Descent Act, 1874.]

"Sect. 6. Immediately upon the granting of probate of the will or administration of the estate, or an order to administer the estate, of any deceased person, all the real estate then unadministered of such person, whether held by him beneficially or in trust, shall vest in the executor or administrator to whom such probate, or administration, or order shall be granted, as the case may be, for all the estate therein of such person."

"Sect. 10. Subject to the provisions of this Act, the executor or administrator shall hold—

"(1.) The real estate of any person who dies leaving a will according to the trusts and dispositions of such will, so far as such will devises or affects such real estate:

"(2.) The real estate of any person who dies intestate as to such real estate after this Act comes into operation, upon trust for the person or persons who, if such real estate were personal estate, would be entitled to such personal estate; and such person or persons shall in all respects have the same shares, estates, powers, and interests in and over such real estate as he or they would have in case the same had been personal estate.

"(5.) The real estate of any person who died on or before the first day of October, 1875, intestate as to such real estate, upon trust for the persons who would have been entitled if 'The Real Estate Descent Act, 1874, and this Act had not been passed.'"

By ss. 4 and 11 of the Administration Act, 1908, a consolidation statute, s. 6 and s. 10, sub-ss. 1, 2 and 5, of the Administration Act, 1879, are substantially re-enacted.

Little more than a superficial examination of these enactments is required, as their Lordships think, to show in the words of a learned judge in Victoria [Stephen J.] with reference to a corresponding statute of that State that " the heir-at-law is not extinguished yet " : *Larkin* v. *Drysdale.* (1) So far as the Act of 1874 is concerned, the survival of the " heir-at-law " to whom lands would but for the Act have descended is by the proviso to s. 3 assumed : and whereas by s. 18 a more extended meaning is, as a result of the Act, thereafter to be attached " to the word ' heir ' or ' heirs ' " in the reading and construction in future Acts of Parliament, deeds and documents, no such extended meaning is directed to be attributed to the word " heir-at-law " when there found, an omission the more significant when it is recalled that the " heir-at-law " has been in terms treated as existing in the proviso to s. 3.

But, as has been stated, the Act of 1874 was repealed by the Act of 1879, which thenceforth took its place, and still remains in force by re-enactment in the Act of 1908. It is important, therefore, to note that by the Act of 1879, and in an even more striking fashion than in the repealed Act of 1874, it is made clear that the old " heir-at-law " remains in New Zealand an existing personage notwithstanding anything contained in the new Act. Under s. 6 the vesting of the real estate of a deceased person in the executor is, as will have been seen, to take effect immediately upon " the granting of probate of the will or administration of the estate or an order to administer the estate " of the deceased. But not before. And in Victoria, under the Administration Act, 1872, of that State, No. 427, s. 6—a section admittedly indistinguishable from this s. 6 of the New Zealand Act of 1879—it was held as long ago as 1875 in *Larkin* v. *Drysdale* (1) that there was in that section nothing to destroy the status of the old heir-at-law between the death of the deceased and grant of administration to his estate, and an action of ejectment brought during that interval by the heir-at-law in respect of the property of the deceased was accordingly there sustained. The correctness of the principle enunciated in *Larkin* v. *Drysdale* (1) was not canvassed by the respondents here. Nor could it well have been: it is fundamental: it has been applied in England in analogous circumstances under the Land Transfer Act, 1897, when in *In re Griggs. Ex parte School Board for London* (2), Lord Cozens-Hardy M.R. observed (3): "Until there is a personal representative the property vests in the heir." And perhaps upon this subject the judgment of this Board in *Wentworth* v. *Humphrey* (4) may be referred to. In that case their Lordships were called upon to deal with s. 1 of "Lang's Act" the New South Wales Real Estate of Intestates Distribution Act, 1862. That section, which will later have to be referred to again, is as follows: "From and after the passing of this Act, all land which, by the operation of the law relating to real property now in force, would, upon the death of the owner intestate in respect of such land, pass to his heir-at-law, shall instead thereof pass to and become vested in his personal representatives in like manner as is now the case with chattel real property."

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(1) (1875) 1 V. L. R. (L.) 164,166.

In *Wentworth* v. *Humphrey* (4) the deceased owner was illegitimate, and died leaving no heir, and the Board held that the section applied to all cases and not merely to cases in which the dead owner had actually left an heir. So far from the view being taken, however, that after the Act there was no common law heir for him to leave, the Board were of opinion that inquiry as to whether the deceased owner had or had not left one was not always required for the reason that such an inquiry was "often a long and difficult one" (5): not in any way, be it observed, because it could have no result.

To sum up, this examination of the legislation in question appears clearly to show that in New Zealand it has not put an end to the common law heir-at-law: it merely results that he shall not ultimately take beneficially as heir. So far from denying his continued existence it leaves vested in him, for an interval of indefinite duration, it may even be permanently, the New Zealand real estate of every owner who dies possessed of such property. During that term of vesting too the rights of ownership with reference to the property are not in suspense; so that the status of the heir-at-law is brought literally within the words of Blackstone's well known definition of an heir as being one "upon whom the law casts the estate immediately on the death of the ancestor." (1)

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(1) (1875) 1 V. C. R. (L.) 164.
(2) [1914] 2 Ch. 547.
(3) Ibid. 552.
(4) (1886) 11 App. Cas. 619.
(5) Ibid. 626.

In view of all this, is it remarkable that, as was shown to their Lordships by cases cited on behalf of the appellant, the term "heir-at-law," meaning thereby the common law heir, is in constant judicial use in New Zealand? In short, their Lordships cannot but conclude that the New Zealand legislation above detailed at length is in no way operative to justify an interpretation of the term "heir-at-law," when found unqualified in a will made after it was enacted, which would not have been appropriate had the legislation not been passed,—to apply the phrasing of s. 10, sub-s. 5, of the Act of 1879.

A passage from the judgment of the Lord Chancellor in the well-known case of *Jones* v. *Ogle* (2) is helpful at this point. Lord Selborne, there envisaging a will dated after the passing of a relevant statute, makes this comment (3): "I can quite follow the argument which would say that in such a case a testator makes his will, having the Act of Parliament in view, and that the words he uses are not to be construed without regard to the Act of Parliament."

This process may very usefully be applied to this testator and his will. The words of the will, "heir-at-law of such survivor," have here to be interpreted. These words admittedly—the legislation of 1874 and 1879 apart—describe the survivor's common law heir: had that legislation not been passed he would have been under this will the ultimate devisee of the testator's real estate. The legislation has been examined in this judgment, and it is now found that while thereby the old heir-at-law may have been reduced to a

(1) 2 Black. Comm., p. 201.
(2) (1872) L. R. 8 Ch. 192.
(3) (1872) L. R. 8 Ch. 195.

shadow of his former self, at the date of the will he survived in New Zealand and he still survives there with definite rights and privileges appertaining to his status, remaining an heir—a circumstance for the purposes of this case specially important—capable of being ascertained and identified as easily as before. The result appears to their Lordships to be that this will of the testator, unambiguous in this respect apart from that legislation, remains when construed with it in view as unambiguous as ever. The words in debate—here as has been shown words of identification only—remain the sufficient, probably the most strictly correct description of the survivor's common law heir—a description, moreover, which remains in New Zealand as exclusively applicable to that heir—as it ever was.

But the majority of the Court of Appeal, moved by the magnitude of the change in the law of succession to New Zealand real estate effected by the legislation in question, have been able to find in this will in the words " heir-at-law of such survivor " a reference to the survivor's statutory next of kin—a reference, that is to say, not to a single individual, but to a class—here, as it has happened, to a numerous class of persons, one of them—the widow of the survivor—neither of his kin nor of the testator's. The grounds assigned for this view must presently be looked at. Meanwhile, however, it will not be inconvenient to ascertain from an examination of the will itself how far the word as a nomen collectivum is consistent with its other provisions either as a whole or in detail. This subject has been very fully dealt with in the judgments under review and in the arguments before the Board.

And if the will be read—as presumably it still should—with the legislation of 1874 and 1879 in view—the testator is seen thereby to be exercising to the full the power of testamentary disposition over his real estate which remained his under s. 10, sub-s. 1, of the Act of 1879. The destination of his real estate under that Act had evidently no attractions for the testator. His will counters it at every turn. The Act brings about in intestacy a complete fusion of the real

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and personal estate of the deceased: the testator's will maintains, as a predominant purpose, and throughout, the complete separation of the two. The personalty alone is made the subject of the residuary gift: that is to say—such is the favour extended to the realty—it is upon the personalty that the legacies are exclusively charged and, in contra-distinction to the Act of 1879, it is thereout that the debts and testamentary expenses are primarily to be paid. Again, while the interests taken by the testator's brother and nephew, whether in his residuary personalty or devised realty are in every respect equal, each takes in the personalty immediately, and, by appropriate language, an absolute interest, while in the realty, neither of them, putting it shortly, takes more than an equitable life estate. In other words, the residuary personalty is at once disposed of out of hand. But the real estate in direct contrast is, intact, retained settled by directions calculated to ensure first, that so long as it remains vested in its trustees there shall never be any disposition of any part of it for more than twenty-one years and, next, that, as real estate and still intact, it may, twenty-one years after the death of the survivor of the two tenants for life, father and son, be conveyed "to the heir-at-law of such survivor his heirs and assigns"—words of limitation appropriate to real estate only. And when it is remembered that John Leed Macleay was the eldest son of his father, and that accordingly, and as has in fact happened, the same person would in all probability be the common law heir of each, as survivor, that heir being a Macleay of a later generation, the inference becomes compelling that it was not upon a heterogeneous collection of individuals, but upon such a single clansman as has just been described, that the testator had it in mind to direct, as in words he did direct, that his real estate should devolve.

But the indications of the will to this effect do not end here. There are others no less arresting. The limitation to the "heir-at-law" in the singular is the more striking when found, as it is, in immediate association with the "heirs and assigns" in the plural of that same "heir-at-law." Again,

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the inference that the "heir-at-law" was in the testator's contemplation a single person is made, as it seems, well nigh irresistible by the statement of his "true intent,"—namely, that the heir-at-law "shall ultimately take the whole of the corpus." Lastly, the direction that pending conveyance and transfer the trustees are to pay the rents, profits and emoluments of the property to him "for his absolute use and benefit" is a final indication, clear as their Lordships think, that the "heir-at-law" in this will, whatever else he may be, is not a noun of multitude.

Indeed, if the will be read as a whole the conclusion seems inevitable that the survivors' statutory next of kin are not within its provisions, so that even if the conclusion of the majority of the Court of Appeal could be accepted, namely, that in view of preceding legislation the heir-at-law must in a New Zealand will of 1891, prima facie at least, be held to mean the statutory next of kin of the propositus, that conclusion is, in this will, displaced by other provisions inconsistent with it. Here their Lordships find themselves in complete agreement with the minority of the Court of Appeal—the Chief Justice and Reed J.—when these learned judges hold that even if the conclusion of the majority of the Court were well founded as to the prima facie signification of the word "heir-at-law" the claim of the appellant to be, by this will, the devisee of the testator's real estate, was nevertheless established.

But is that conclusion of the majority well founded? The view of the Board that, even if justified, it is displaced by other provisions of the will now deprives the question of practical importance. But it raises a matter of general interest, and in any case their Lordships, out of respect for the elaborate and most careful judgments in which it has been justified by the learned judges who reached it, would not refrain from dealing with it, albeit less elaborately than might otherwise have been fitting.

It is in the judgment of Johnston J. that these views of the learned judges are most elaborately expounded. The conclusion reached by him is really based upon the proposition that to describe as the heir-at-law say of A.B., a person who can, as such, inherit no real estate from A.B., is a contradiction in terms. With some hesitation, perhaps, but still definitely, the learned judge further holds that the statutory next of kin of A.B. to whom, by Act of Parliament, his real estate with his personalty passes on his death intestate, have now, in New Zealand phraseology, so far become his "heir-at-law" that they may be held to have been properly and sufficiently so described without more in a New Zealand will, made, as was the testator's, in 1891.

The first of these propositions is primarily based upon definitions of authority found in English judgments and text books which import that the heir of A.B. is in England one who on A.B.'s death intestate inherits the real estate of which he died possessed. Sir George Jessel's definition of "lawful heirs" in *Smith* v. *Butcher* (1) is specially relied upon (2): "'Lawful heirs,' means the person or persons who either alone or together would succeed to the fee simple estate of which the intestate ancestor died seised in possession at the time of his death."

And this definition is made more appropriate to this case by adding to it the statement in Challis on Real Property, 3rd ed., p. 230: "The word 'heir' has no meaning except in reference to *an estate to which the person so designated might possibly succeed by inheritance.*"

The learned judge, while relying on these definitions in support of his first proposition, has not paused to consider how far they may be subversive of his second. If there must be an estate to constitute an heir, so also, it would seem, must there be an "ancestor" from whom he may inherit. That is to say, an heir strictly so called must be of kin to the propositus. His widow, for example, cannot in any proper sense be described as "heiress" of her deceased husband.

But their Lordships do not pursue this discussion, on which there is much to be said. They content themselves with the observation that in England when these definitions were propounded there was no legislation in force analogous to the

(1) (1878) 10 Ch. D. 113.

(2) Ibid. 116.

New Zealand legislation of 1874 and 1879, the effect of which in New Zealand on this very subject has been already noted. Their Lordships, however, do not pursue the discussion because it is, they think, irrelevant to the one question before the Board. In this case they are concerned only to discover according to the terminology of the law of New Zealand the meaning in a New Zealand will of the expression "heir-at-law" and that meaning is surely authoritatively to be ascertained from the legislation in force in New Zealand with reference to the succession to real property there on the death of its owner intestate. Each of the learned judges of the Court of Appeal has expressed his conclusion on this point without making any reference to the provisions of that legislation to which apparently the attention of the Court was not in this connection directed. Their Lordships have taken a different course, and now that on examination the legislation is shown to have on this will the effect already stated, that effect cannot be nullified by considerations which may ignore but cannot be operative to displace it. And the above and other like considerations upon which the learned judges of the majority rely for their conclusion may all, their Lordships venture to think, be so described.

But the learned judges have further felt themselves supported in their conclusion by what they take to be the result of a great number of authorities found in the law reports, not only of New Zealand but of the different Australian States in which legislation in substance but not in terms the same as the New Zealand legislation of 1874 and 1879 has been passed. Their Lordships, under the guidance of the learned judges, who have tabulated these cases with great care, have considered them all, but they have not found there any real assistance in the task of construing the testator's will here. Reed J., in the course of his judgment referring to the New Zealand authorities, observes that it might with confidence be said that they raised no doubts as to what, with the Chief Justice, he held to be the true construction of the testator's will. This in their Lordships' opinion may be said of all the authorities cited.

It will suffice as an illustration of what they mean by this statement to refer to the most typical, the case of *Morrice* v. *Morrice* (1), a New South Wales decision of 1893 specially relied upon by Johnston J. in his judgment, and constantly referred to by the other learned judges.

The enactment in force in New South Wales and governing that case was s. 1 of the Act of 1862—Lang's Act already cited. By the will there the testator devised lands to his son in fee, with power in the event of the son's dying without issue to appoint to his wife for life, and upon the death of the wife for the testator's "heirs." There was no context. Who were designated under the word "heirs"? That was the question. The learned judge, Owen C.J., applying Lang's Act, decided that the personal representative of the testator was the person designated by him as his "heir," and that he held the property in trust for the testator's statutory next of kin. The decision has been much canvassed. Hard as it is to understand, it is unnecessary for their Lordships to consider or express any opinion here on the question whether or not it was, in view of Lang's Act, well decided. Their present difficulty is to see how the case can have any application to the testator's will, where the gift is not to the "heirs" in the plural of the testator, but is to the "heir-at-law," in the singular, of a third person altogether. Upon this second point of difference in respect of description Johnston J. seems in his judgment to suggest that Owen C.J. would have decided *Morrice* v. *Morrice* (1) in the same way, if in the will there the word "heir-at-law" had been substituted for the word "heirs." This suggestion, if it be intended by the learned judge, their Lordships cannot accept. In s. 1 of Lang's Act the "heir-at-law" and the statutory next of kin are as beneficiaries brought into immediate contrast. It is difficult to see how a devise to the testator's heir-at-law without context, construed with that Act in view, could be anything else than a devise to his common law heir. This statement is important, because, prior to the order now under review, there is no recorded instance, either in New Zealand or Australia, of the words "heir-at-law" in a will with no context being construed as the equivalent of statutory next of kin, while the view that the words are too inelastic to be so extended is more than once judicially expressed, and is supported by the implications of the Act of 1874 to which reference has already been made.

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(1) (1893) 14 N. S. W. R. Eq. 211.

It may be noted that the order now under review reproduces almost textually the order in *Morrice* v. *Morrice*. (1) It declares that " the estate in fee simple in the testator's real estate is held by the testator's *executors* upon trust for the persons who would under the Administration Act, 1908, have taken any real estate of the survivor of Alexander Macleay and John Leed Macleay, if such survivor had died intestate." It seems that the executors there referred to are the executors appointed by the will. If this be so, the order in *Morrice* v. *Morrice* (1) has first been followed and has then been extended to a state of circumstances to which that order had no application. The executors here have long since ceased to function in favour of the respondent trustees, Messrs. Treadwell and Gordon, who since their appointment as trustees in 1913 have as devisees held the property upon the trusts declared by the testator's will. And they have never been executors of the will. There is no evidence that the appointed executors *or* either of them are now even alive.

But it may be that it is the respondent trustees to whom, under the name of executors, reference is made in the order. If so, the order imports that the testator's will, which in terms directs that the property shall be conveyed by the trustees to the " heir-at-law of such survivor," means on its true construction that the property is to be conveyed to that survivor's statutory next of kin—a finding for which in their Lordships' judgment, for the reasons already given, there is no sufficient reason.

The learned judges of the majority are not unconscious of the difficulties in the way of their construction created by the inconsistent provisions of the will to which attention has been drawn. They deem these insufficient to affect the result which, in their view, is reached apart from them. Johnston J.

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(1) 14 N. S. W. R. Eq. 211.

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seems to agree that these provisions, had the only issue been whether the testator was referring to one New Zealand heir or to another, might have satisfied him that it was an heir in the singular who was pointed at. He considered himself entitled, however, to disregard or to discount these provisions because to permit them to have effect would result, as he saw it, in the introduction of elements of foreign law into a disposition of New Zealand real estate. That this would result seems also to have been the view of Smith J. Their Lordships find it difficult to follow the learned judges here. Their Lordships, on what has seemed to them to be the true construction of the testator's will, have held that it is to the appellant as the New Zealand heir-at-law of his deceased father that the testator's real estate now passes. But if on the true construction of the will it had been held that it was John Leed Macleay's Scots heir-at-law who was so entitled, the acceptance of that conclusion would not have involved the introduction of the Scots system or any part of it into this administration. To give effect to a devise, even to a foreigner who can be identified, is not to introduce any foreign law. Rather is there thus recognized the quite lawful exercise of a testator's valuable right of testamentary disposition enjoyed by him under the law of New Zealand. To refuse for any such reason to recognize such a devisee is to prejudice that right, one which in its lawful exercise it is, as their Lordships feel will be, on all hands, recognized a primary duty of every New Zealand tribunal, as it is of their Lordships on appeal to His Majesty in Council, to acknowledge and vindicate.

Their Lordships need go no further. In their judgment the appellant has established that he is the heir-at-law referred to in the will of the testator, and, if so, it is now agreed that he is entitled to an immediate conveyance from the respondent trustees of the entirety of the testator's real estate.

The order of the Court of Appeal except as to costs should be discharged and a declaration made to the above effect. And their Lordships will humbly advise His Majesty accordingly.

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The costs of all parties of this appeal, taxed as between solicitor and client, should before conveyance be defrayed by the trustees out of the property in their hands.

Solicitors for appellant: *Coward, Chance & Co.*
Solicitors for respondents: *Wray, Smith & Halford.*

[PRIVY COUNCIL.]

LAKE VIEW AND STAR, LIMITED . . APPELLANTS;

AND

COMINELLI AND ANOTHER . . . . . RESPONDENTS.

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Feb. 26.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Mines (Gold)—Tributers—Agreement with owners of treatment plant—Payment regulated by statute—Compromise agreement—Payment at less than statutory minimum—Compromise agreement illegal and void—Retrospective effect—Mining Acts, 1904–23 (*No.* 15 *of* 1904—*No.* 12 *of* 1923 (*consolidated and reprinted on December* 2, 1925)), *of Western Australia, ss.* 152, 156.

The respondent and another, who were tributers of a gold mine on the terms of tribute agreements made in 1930 with the appellants, the lessees of the mine and owners of a treatment plant, brought an action claiming in substance an account of all sums due to them from the appellants under the tribute agreements. Those agreements were subject to the provisions of the Mining Act, 1904, of Western Australia, as amended in 1919, 1920, 1921 and 1923, which, by s. 152, provided (inter alia) that in all contracts between a tributer and the owner of a treatment plant relating to the treatment of gold ore the owner of the treatment plant should pay to the tributer not less than 50 per cent. of any premium received by him on the sale of the gold obtained from the ore treated. The defence to the action was that by an agreement made in March, 1932, the parties had agreed, owing to differences as to the meaning of " premium," that the appellants should pay to the tributers certain sums other than those stipulated for by the tribute agreements. Those sums, as provided by the agreement of March, 1932, included " (*b*) Twenty per cent. of the amount actually received or to be received by the [appellant] company in Australia as and by way of exchange . . . . on the value computed at 4*l.* 4*s.* 11½*d.* per ounce of fine gold of all such gold . . . . exported by the company . . . . " The reply to the defence was that the agreement of 1932 was illegal and void as being contrary to the provisions of the Mining Acts, in that only 20 and not 50 per cent. " of any premium received " was payable by the owner :—

Held, that in the light of the decision in *Great Boulder Proprietary Gold Mines, Ld.* v. *Scriven* (1932) 36 W. A. L. R. 101, in which judgment was delivered in November, 1932, that what the mine lessees in that case received in Australian currency, by reason of the difference in exchange, in excess of the fixed London price of 4*l.* 4*s.* 11½*d.* per fine ounce for gold sold in London, was "premium," the provision in the agreement of March, 1932, to pay only 20 per cent. of the amount received by the appellants by way of exchange was contrary to the terms of s. 152 of the Mining Acts. That stipulation as to 20 per cent. was therefore in violation of the statute and was illegal and void, and as it formed part of the consideration for the release from liability under the tribute agreements the release was also invalid.

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* *Present :* LORD BLANESBURGH, LORD ATKIN, LORD MAUGHAM, LORD ROCHE, and SIR SIDNEY ROWLATT.

The Act was intended to protect tributers in respect of their own contracts, and its terms were obligatory. The owner of a treatment plant must not pay to the tributer less than 50 per cent. of any premium, and the parties could not support a plain violation of such an Act by failing to agree on its meaning and calling an agreed variation a compromise: they misunderstood it at their peril.

Principles in *Netherseal Colliery Co.* v. *Bourne* (1889) 14 App. Cas. 228, and *Brace* v. *Abercarn Colliery Co.* [1891] 2 Q. B. 699 applied.

Judgment of the High Court of Australia (1934) 51 C. L. R. 553 affirmed.

APPEAL (No. 33 of 1935), by special leave, from a judgment of the High Court of Australia (September 12, 1934), reversing a judgment of the Supreme Court of Western Australia (March 19, 1934), which reversed a judgment of the Warden's Court at Kalgoorlie (December 1, 1933).

The appellants were lessees of a gold mine and owners of a treatment plant in the East Coolgardie gold field. The respondent Giocomo Cominelli and one Martino Bonazzi, of whose estate his widow, Maria Bonazzi, was the administratrix, at all material times were tributers of the mine on the terms of tribute agreements made with the appellants on May 15, 1930, and duly approved and registered by the Warden. On October 19, 1933, the two tributers commenced the present action in the Warden's Court claiming in substance an account of all sums due to them from the appellants under the tribute agreements. The defence was that by an agreement of March 18, 1932, the parties had agreed that the defendants (appellants) should pay to the plaintiffs (respondents) for the gold delivered by them to the defendants certain sums other than those stipulated for by the tribute agreements, and that on making such payments they should be released and discharged from their liability to make the payments agreed to be made in the tribute agreements; that they duly made the said payments and that the sums were received in full settlement of all claims. The reply was that the agreement of March 18, 1932, which provided (inter alia) that the tributers were to receive only "twenty per centum of the amount actually received or to be received by the [appellant] company in Australia as and by way of exchange . . . . on the value computed at 4*l.* 4*s.* 11½*d.* per ounce of fine gold of all such gold . . . . exported and sold by the company . . . ." was illegal and void as being contrary to the provisions of the Mining Acts, 1904–23, s. 152, which provided that in all contracts between a tributer and the owner of a treatment plant (whether the lessee of the mine under tribute or not) relating to the treatment of gold ore, the following provisions should apply: "(*b*) The owner of the treatment plant shall also account for and pay to the tributer not less than 50 per cent. of any premium received by such owner on the sale of the gold obtained from the ore treated."

The facts, the relevant statutory provisions and the material terms of the agreement of March 18, 1932, appear from the judgment of the Judicial Committee.

The Warden held that the agreement of March 18, 1932, was void.

The Supreme Court of Western Australia (Northmore C.J.) held that it was not void.

The High Court of Australia (Rich, Dixon and McTiernan JJ.) unanimously affirmed the decision of the Warden. The appeal is reported at (1934) 51 C. L. R. 553.

1937. Jan. 25, 26. *Sir William Jowitt K.C.* and *St. John Field K.C.* for the appellants. The Western Australian Legislature, to protect tributers, passed the Mining Act of 1904 and its amending Acts which, by s. 152, provided that the tributers were to have 50 per cent. of the premium on gold whether or not the contract stipulated for it. After the tribute agreements in this case had been worked disputes arose as to what the rights of the parties were. The

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decision of this Board in *Great Boulder Proprietary Gold Mines, Ld.* v. *Scriven* (1) had not been given, and no one could know what was meant by "premium." The parties thereupon got together and, it is submitted, entered into a perfectly valid agreement of compromise under seal for the settlement of all their rights whatever they might be. Then, in November, 1932, came the decision in the *Scriven* case (1), and the tributers then said that by entering into that compromise agreement they had deprived themselves of some of the statutory rights which the Legislature intended them to have, and that the compromise agreement was therefore invalid and void.

England went off the gold standard in September, 1931, and a question arises here whether, when there is no longer a par, there can be a premium. It is alleged by the respondents that the compromise agreement is bad because instead of giving them 50 per cent. of the exchange payment in Australia which they are entitled to under s. 152 of the Mining Acts, they are to receive only 20 per cent. From the moment of time that England went off the gold standard there was in the very nature of things no premium at all; whether the money is paid in Australia or in England there can be no premium.

[*Fergus Morton K.C.* for the respondents, intervening: The only question in this appeal is whether the compromise agreement entered into by the tributers could validly affect their statutory right to get 50 per cent. of the premium, whatever "premium" may mean. What is a premium was discussed in the High Court of Australia, but it was stated that the present appellants expressly asked the High Court not to decide whether the increased price arising from England going off the gold standard was or was not a premium. The only question is, could the two tributers validly give up their statutory rights by the compromise agreement?]

[LORD BLANESBURGH. It has got to be established that the release agreement is inconsistent with the statute before it can be set aside.]

Sir William Jowitt K.C., continuing. Where there is a genuine doubt as to statutory rights, two parties sui juris are entitled to compromise the position. Is the compromise agreement, or alternatively, are the payments made thereunder, payments which must be taken to have put an end to whatever rights the tributers may have had under the tribute agreements? [Reference was made to the material sections of the Mining Acts.] This case must turn very largely on the true construction of s. 152 of the Act. Where there is a genuine compromise and all the parties are sui juris, the broad proposition of law is that unless there are very clear words in the Act forbidding it, the two parties are perfectly entitled to make what agreements they like. The authorities appear to differentiate the past position and the regulating of the terms of the future. It may be that an attack can be made on this agreement of compromise in that it not only relates to that which is past, but also governs the relationship to continue between the parties in the future; and therefore it may be said that it is bad in toto, or bad in so far as it concerns the future. So far as the future is concerned, viewing the matter from the date of the deed, there is no invalidity at all, because as at that date, and a fortiori after it, there was no such thing as a premium within the meaning of the Act. There is a difference between an agreement to do something which conflicts with the statute and an agreement of compromise. Further, if the agreement is bad in part and good in part it is submitted that it is severable. [Reference was made to *Griffiths* v. *The Earl of Dudley* (1); *Baddeley* v. *Earl Granville* (2); *Netherseal Colliery Co.* v. *Bourne* (3); *Brace* v. *Abercarn Colliery Co.* (4); and *Haydock* v. *Goodier.* (5) It might work great hardship if it is to be laid down as an established principle of law that the parties must not compromise in such circumstances as the present. *Haydock* v. *Goodier* (5) was overruled in *Russell* v. *Rudd.* (6) *Salford Guardians* v. *Dewhurst* (7), which is against the appellants, is not a case of a compromise. The principle is that with regard to the past parties may come to what agreement they like, but the law does not encourage people to continue in the future upon a course which involves breach of a statute. Before it can be said that the Legislature has taken away the freedom of contract, at any rate in so far as compromising in respect of the past in regard to claims which have arisen, there must be found some, not necessarily express words, but some very clear implication from the statute itself saying that that cannot be done. There is no provision at all against contracting out in the present Acts. If the true view be that the agreement would have been all right had it been confined to the past, but is invalid in that it extends to the future, does that make the agreement bad altogether, or does it merely make it bad in so far as it deals with the future: *In re Burdett. Ex parte Byrne* (1); *Netherseal Colliery Co.* v. *Bourne* (2); and *Stanton* v. *Brown.* (3) Looking at the matter as it existed in March, 1932, when the compromise agreement was made, there was no such thing as a premium any longer, and therefore the compromise agreement as a whole does not infringe the statute in regard to the future. The decision of the High Court of Australia should be reversed.

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(1) 36 W. A. L. R. 101.

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(1) (1882) 9 Q. B. D. 357, 364.
(2) (1887) 19 Q. B. D. 423, 426.
(3) (1889) 14 App. Cas. 228, 237, 240, 242.
(4) [1891] 2 Q. B. 699, 703.
(5) [1921] 2 K. B. 384.
(6) [1923] A. C. 309.
(7) [1926] A. C. 619.

St. John Field K.C. followed. The word "premium" cannot be translated as "profit." This case is not like *Netherseal Colliery Co.* v. *Bourne.* (2) [Reference was also made to *Anctil* v. *Manufacturers' Life Insurance Co.* (4); and *Printing and Numerical Registering Co.* v. *Sampson.* (5)]

Fergus Morton K.C. and *Harold Murphy K.C.*, for the respondents, were called upon to argue only on the question of what was a premium. What is it whereof only 20 per cent. is to be paid? So far at any rate as the transactions before September 21, 1931, are concerned the case is completely covered by *Scriven's* case. (6) That alone would be enough for the respondents, because if the Board are satisfied that there is some sum which was a premium, of which the respondents ought to have had 50 per cent. and of which under the compromise agreement they only received 20 per cent., that would vitiate the whole agreement. As regards exchange, the reasoning in *Scriven's* case (1) must apply to sums received by way of exchange after England went off the gold standard. It is submitted, in fact, that there is no distinction between any of these sums, and that the reasoning in *Scriven's* case (1) applies to them all. The appellants asked the High Court of Australia not to decide what is a "premium," and therefore if this Board decides it it will be doing so without having a judgment of the High Court on the point at all. It is enough for this Board to come to the conclusion that there is something in the decision in *Scriven's* case (1) which is a premium, of which the respondents in the present case were only given 20 instead of 50 per cent. The appellants cannot escape from the liability to pay the 50 per cent. : see the dictum of Lord Macnaghten in *Netherseal Colliery Co.* v. *Bourne.* (2)

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(1) (1888) 20 Q. B. D. 310.
(2) (1889) 14 App. Cas. 228.
(3) [1900] 1 Q. B. 671.
(4) [1899] A. C. 604.
(5) (1875) L. R. 19 Eq. 462, 465.
(6) 36 W. A. L. R. 101.

[Counsel was stopped.]

There was no reply.

Feb. 26. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from a judgment of the High Court of Australia, who reversed a judgment of the Supreme Court of Western Australia and restored a judgment of the Warden's Court of Kalgoorlie in favour of the plaintiffs, the present respondents. The appellants are lessees of a gold mine in the East Coolgardie gold field, and the respondent Cominelli, and one Martino Bonazzi, of whose estate his widow, Maria Bonazzi, is the administratrix, at all material times were tributers of the mines on the terms of tribute agreements made with the appellants on May 15, 1930, and duly approved and registered by the Warden. On October 19, 1933, the two tributers commenced the present action in the Warden's Court claiming in substance an account of all sums due to the plaintiffs from the defendants under the tribute agreements. The defence was that by an agreement of March 18, 1932, the parties had agreed that the defendants should pay to the plaintiffs for the gold delivered by them to the defendants

(1) 36 W. A. L. R. 101.

(2) 14 App. Cas. 228, 247.

certain sums other than those stipulated for by the tribute agreements, and on making such payments should be released and discharged from their liability to make the payments agreed to be made in the tribute agreements; that they duly made the said payments, and that the sums were received in full settlement of all claims. The reply was that the agreement of March 18, 1932, was illegal and void as being contrary to the provisions of the Mining Acts, 1904–25, s. 152. The Warden held that the agreement was void: on appeal to the Supreme Court, Northmore C.J. held that it was not, and on the plaintiffs' appeal to the High Court that Court affirmed the decision of the Warden. No account has yet been taken, and the only point to be decided in this appeal is whether the defence based on the later agreement is good.

The case up to a point is in material respects similar to that of *Great Boulder Proprietary Gold Mines, Ld.* v. *Scriven* (1) decided by the Judicial Committee on November 22, 1932, on appeal from the Supreme Court of Western Australia, and their Lordships find it unnecessary to explain the position of tributers further than was done by the judgment of the Board in that case delivered by Lord Macmillan. The tribute agreement in that case, as in the present, was subject to the provisions of the Mining Act, 1904, as amended in 1919, 1920, 1921 and 1923, which by s. 152 provides that in all contracts between a tributer and the owner of a treatment plant (whether the lessee of the mine under tribute or not) relating to the treatment of gold ore, the following provisions shall apply:—

" (*a*) It shall be obligatory on the part of the owner of such plant " to account for all ores received on the basis of not less than 90 per cent. extraction of the assayed value of the ore.

" (*b*) The owner of the treatment plant shall also account for and pay to the tributer not less than 50 per cent. of any premium received by such owner on the sale of the gold obtained from the ore treated."

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(1) 36 W. A. L. R. 101.

By s. 156 any person who contravenes any of the provisions of the Act for which no other penalty is expressly provided shall be guilty of an offence, and on conviction shall be liable to a fine not exceeding 50*l.* In the *Scriven* case (1) the tribute agreement contained an express stipulation as to the payment of 50 per cent. of any premium received. In the present case there is no express stipulation, but the matter is controlled by the statutory provision. In both cases the lessees of the mine were the owners of the treatment plant in which the gold was extracted. In the *Scriven* case (1) the question arose as to the meaning of the word premium. At that time there was a fixed London price for gold, 4*l.* 4*s.* 11½*d.* per fine ounce, and the question was whether when the lessees of the mine received in Australian currency by reason of the difference in exchange more than 4*l.* 4*s.* 11½*d.* Australian they received a premium, though the gold in London in fact only realized the fixed price. The contention of the lessees was that there was no excess over the fixed price which must be considered the "par," and therefore there was no premium. The Supreme Court rejected this view, as did this Board: and it was held that what the lessees received in Australian currency in excess of 4*l.* 4*s.* 11½*d.* Australian per fine ounce was "premium." In the *Scriven* case (1) the judgment of the Supreme Court was given in August, 1931, a month before England went off the gold standard in September, 1931. The judgment of the Privy Council, though given in November, 1932, had reference only to dates while England was on the gold standard, and the effect of any change in respect of the matter under discussion was not discussed. In the present case, after the decision of the Supreme Court had been given in the *Scriven* case (1), and while the case was under appeal to the Privy Council, on March 18, 1932, the agreement pleaded in the defence was made. It is unnecessary to discuss the circumstances in which the parties came together, for on the hearing of the appeal no attack was made on the validity of the contract apart from the statute. The agreement recited the tribute agreement and that the tributers had sold and delivered and would sell and deliver ore to the company; that the value of gold had increased, and that the company had received and would receive the benefit of such increased value, and that the company would receive a bounty under the provisions of the Gold Bounty Act, 1930–31. It then recited that the tributer claimed to be entitled to receive 50 per cent. of the premium on all gold sold by the company as well as the said bounty and that the company had been and would be paid by its bankers a sum equal to the bank's prevailing selling rate of exchange (London and Australia) on the value of all gold computed at the rate of 4*l.* 4*s.* 11½*d.* per fine ounce. It then proceeds:—

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"And whereas disputes and differences have arisen between the company and the tributer as to the meaning of 'premium' and concerning the amount which the tributer is entitled to receive from the company in respect of premium and bounty on the gold aforesaid.

"And whereas litigation is impending or has been threatened by the tributer against the company concerning the said disputes and differences.

"And whereas the company and the tributer have mutually agreed to settle and compromise the said disputes and differences upon the terms hereinafter expressed now this agreement witnesseth as follows:—

"1. In consideration of the premises and of the covenants and promises by the company hereinafter expressed the tributer agrees to accept from the company in full satisfaction of any claims which he may or shall have or may have had against the company for premium and bounty in respect of all such gold as aforesaid.

"(*a*) Fifty per centum of any bounty hereafter received by the company in respect of such gold under the provisions of 'The Gold Bounty Act, 1930–31' or any amendment thereof.

"(*b*) Twenty per centum of the amount actually received or to be received by the company in Australia as and by way of exchange as aforesaid on the value computed at 4*l.* 4*s.* 11½*d.* per ounce of fine gold of all such gold heretofore

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or hereafter exported and sold by the company as aforesaid.

"(*c*) Fifty per centum of the difference between—

"(i) The value of all such gold computed at the said price of 4*l.* 4*s.* 11½*d.* per fine ounce in Australian money, and

"(ii) The value of all such gold computed at the price actually received by the company for the same in England as though such price were Australian money."

According to the appellants' contentions, here was a bona fide compromise of a genuine dispute, and the mutual covenants and also the payments made under the agreement operated as a discharge of the liabilities under the tribute agreement made for good consideration. And at any rate it was said that even if s. 152 of the Mining Act operated to invalidate the provision of only 20 per cent. on the exchange benefit, the agreement would be good as to the past and as to past transactions the payments actually made would afford a good discharge. It will be sufficient to say that in their Lordships' view the payments cannot operate so as to lead to an inference of a contract to discharge supplemental to or independent of the original contract of March 18, 1932. They are payments under that contract and nothing else: and if that contract is invalid the payments in pursuance of it will have no independent efficacy. As to the agreement of compromise itself, it appears to their Lordships to be made illegal by s. 152. The Mining Act of 1904 as amended, certainly in this provision and apparently in others, e.g., s. 146, is an Act intended to protect the class of tributers in respect of their own contracts. It is intended to interfere with their liberty of contract in their own interests. Its terms are plainly obligatory. "In all contracts the following provisions shall apply." The owner of a plant, therefore, may not account for and pay to the tributer less than 50 per cent. of any premium. To suggest that a tributer may renounce the right to 50 per cent. is to defeat the very terms of the Act, for there would then be a tribute agreement to which the statutory provision did not apply.

It cannot be doubted that the provision contained in cl. 1 (*b*) is contrary to the terms of s. 152 (*b*) when one has the guidance of the decision in the *Scriven* case (1) as to the meaning of premium. For instead of paying not less than 50 per cent. of any premium received the owner is to pay only 20 per cent.

These provisions appear to fall precisely within the principles enunciated in the House of Lords in *Netherseal Colliery Co.* v. *Bourne* (2) which served to protect miners in respect of contracts made contrary to the terms of the Coal Mines Regulation Acts: principles followed in the decision of *Brace* v. *The Abercarn Colliery Co.* (3) And as the agreement is invalid as to the future so is it in respect of the past. The stipulation that for ore already delivered the company shall pay less than 50 per cent. of the premium equally offends against the Act. As this agreement is drawn it seems impossible to distinguish between the past and future: the effect is that in respect of past as well as future deliveries the tributers agree to accept less than 50 per cent. But if the sum had been a lump sum arrived at on the same basis the same result would have followed. Moreover, the parties cannot support a plain violation of such an Act by failing to agree on its meaning, and calling an agreed variation a compromise. They misunderstand it at their peril.

It is plain, therefore, that this stipulation as to 20 per cent. of the difference in exchange is in violation of the statute, and is illegal and void. It forms part of the consideration for the release which appears to depend upon the covenants on either side. The release is therefore invalid, and the defence fails. Their Lordships have not thought it necessary or desirable to consider the exact meaning of "premium" in the statute, as it is clear that in respect of the exchange over 4*l.* 4*s.* 11½*d.*, the exact point decided in *Scriven's* case (1), there is a breach of the statute. The judgment of the High Court contains this passage (4): "For these reasons the judgment of the Supreme Court ought to be reversed and the order of the Warden restored. That order does not declare

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(1) 36 W. A. L. R. 101.
(2) 14 App. Cas. 228.
(3) [1891] 2 Q. B. 699.
(4) (1934) 51 C. L. R. 566.

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that the amounts obtained by the respondent company in respect of the gold in excess of 3*l.* 17*s.* 10½*d.* per ounce of standard gold are premiums. Although we do not doubt that that was the Warden's opinion, yet we agree with the contention of the respondent that, under the order made, it remains open to the respondent company to contend on the taking of accounts that some or all of this excess does not constitute a premium, notwithstanding the decision of the Privy Council in *Scriven's* case. (1) We do not desire to encourage this contention, but as counsel for the respondent company submitted that the question did not arise upon this appeal, which concerned only the order made by the Warden, and that we ought not to decide the question so as to conclude the parties, and, as he did not argue it fully before us, we refrain from expressing any final opinion upon it." Their Lordships concur in what was there said, and with equal lack of encouragement. Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Birkbeck, Julius, Edwards & Co.*
Solicitors for respondents: *Gregory, Rowcliffe & Co.*

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March 8.

[PRIVY COUNCIL.]

LAVERDURE . . . . APPELLANT;

AND

DU TREMBLAY AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Canada (Quebec)—Will—Deed of gift—Dividends on shares in industrial company—Death of beneficiary shortly before declaration of dividend—Dividends " civil fruits "—Considered to have been acquired day by day—Beneficiary's widow entitled to proportionate part of dividend—Civil Code of Quebec, arts. 443, 447–451; *art.* 981 (*a*)–(*n*) (*added to the Civil Code by R. S. Q.* 1888, *art.* 5803 (42 & 43 *Vict. c.* 29), *ss.* 1–14.

Dividends paid out of the profits of industrial companies in Quebec, Canada, declared periodically so far as circumstances permit, are generally speaking to be treated as " civil fruits " within art. 449 of the Civil Code of Quebec, and must, pursuant to art. 451, be considered as having been acquired day by day and belonging to the usufructuary in proportion to the duration of his usufruct.

E., who was entitled under the will and a deed of gift of his father to certain dividends payable by a company of which his father had been the founder and sole shareholder, died three days before the declaration of dividends on its preferred and common stocks out of profits admittedly earned during E.'s lifetime. On a claim by the appellant, the widow and executrix and universal legatee of E., to the proportionate share of the dividends so declared which she alleged was due to her husband at the date of his death under the will and deed of gift:—

Held, first, that although E. was not a usufructuary under the deed of gift, having only a right as beneficiary to share in certain " fruits and revenues " (the dividends) distributed from time to time by the trustees under the deed of gift, he was, by virtue of the provisions of art. 981 (*a*) to (*n*) of the Civil Code of Quebec, a beneficiary under the deed of gift and the will with personal rights against the fiduciary donees and the fiduciary legatee respectively.

Held, secondly, that art. 451 of the Civil Code was applicable by analogy to the rights of a beneficiary under the will and deed of gift in respect of the dividends declared by the company. The

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* *Present:* LORD BLANESBURGH, LORD ATKIN, LORD MAUGHAM, LORD ROCHE, and SIR SIDNEY ROWLATT.

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dividends in question, therefore, were civil fruits subject to the principle contained in art. 451 that they should be considered to have been acquired day by day, and E.'s widow was accordingly entitled to her husband's proportionate share of the dividends which were in fact declared three days after his death.

Judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) reversed.

APPEAL (No. 96 of 1936) from a judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) (April 28, 1936), reversing by a majority a judgment of the Superior Court for the Province of Quebec, District of Montreal (January 10, 1935).

In the action out of which this appeal arises the appellant, Georgiana Laverdure, the widow and universal legatee of Edouard Berthiaume, who died on December 24, 1933, claimed from the respondents, the trustees under a deed of gift executed by her late husband's father, and the trustee under the father's will, part of a dividend declared by La Presse Publishing Co., Ld., on its preferred and common stock on December 27, 1933, three days after the death of her husband.

The main questions in the appeal were whether the fruits or revenues, that was, the dividends, of La Presse Publishing Co., Ld., a one-man company in which the testator had owned substantially all the preference and common stock, were "civil fruits" within the meaning of art. 449 of the Civil Code of Quebec; and whether those revenues existed only when the dividends were declared or paid by the company, or whether they were to be considered as accruing to the beneficiary from day to day and were apportionable in respect of time accordingly.

The facts, which were not in dispute, the material provisions of the deed of gift and of the will, and the relevant sections of the Civil Code of Quebec appear from the judgment of the Judicial Committee.

The Superior Court, District of Montreal (Duclos J.) held that the dividends were civil fruits under art. 449, and that they represented profits accrued before the death of Edouard Berthiaume, and he ordered the trustees to pay to the appellant $13,335.42 as being her husband's proportionate

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share in the dividends accrued up to the date of his death, December 24, 1933.

On appeal to the Court of King's Bench (Appeal Side) (Bond, Galipeault and St. Jacques JJ., Dorion and St. Germain JJ. dissenting) the majority held that on the true construction of the deed of gift and the will the testator's intention was to keep his fortune in his family and to exclude the widows or the estate of his children dying without issue, and they accordingly reversed the judgment of the Superior Court.

1937. Feb. 2, 4, 5. *Alphonse Décary K.C.* for the appellant.

Aime Geoffrion K.C. for the respondents.

[In addition to the authorities cited in the judgment of the Judicial Committee the following cases were referred to in argument: *O'Meara* v. *Bennett* (1); *Laliberté* v. *La Rue* (2); *Herse* v. *Dufaux* (3); *Abbott* v. *Fraser* (4); *Quebec Railway, Light, Heat and Power Co.* v. *Vandry* (5); and *Masson* v. *Masson.* (6)]

March 8. The judgment of their Lordships was delivered by LORD MAUGHAM. This is an appeal from a judgment of the Court of King's Bench (Appeal Side), Province of Quebec, reversing by a majority of three judges, Bond, Galipeault and St. Jacques JJ., with two dissentients, Dorion and St. Germain JJ., a judgment of the Superior Court, District of Montreal. By that judgment Duclos J. had maintained an action in which the appellant, Georgiana Laverdure, the widow, testamentary executrix, and universal legatee of Edouard Berthiaume, who died on December 24, 1933, claimed from the respondents, trustees under a deed of gift executed by the late Hon. Trefflé Berthiaume (to be called for convenience " the donor "), and also from the respondent Du Tremblay, as sole trustee under the will of the donor, certain dividends declared by the respondents, La Presse

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(1) [1922] 1 A. C. 80, 86.

(2) [1931] Can. S. C. R. 7, 20.

(3) (1872) 9 Moo. (N. S.) 281, 293, 311.

(4) (1874) L. R. 6 P. C. 96, 117.

(5) [1920] A. C. 662, 671.

(6) (1912) 47 Can. S. C. R. 42.

Publishing Company, Ld. (to be called "the company") on its preferred and common stocks on December 27, that is to say, three days after the death of Edouard Berthiaume, payable on January 2 following. It is admitted that the profits out of which the said dividends were declared were earned during the lifetime of Edouard Berthiaume. The appellant recovered judgment in the first Court for the total sum of $13,335.42, being her husband's share in the dividends so declared; but the action was dismissed on the appeal.

The facts are not in dispute. The donor was the founder and, in substance, sole shareholder in the company. There were 7500 common shares and also certain preference shares in the capital of the company. The ordinary shares have become very valuable. By his will, dated June 23, 1913, he bequeathed all his property to his eldest son, Arthur Berthiaume, as trustee (*legataire fiduciaire*), and he gave him a hundred common shares in the company. It may be mentioned that the trustee was given wide powers of administration, with power to sell except as regards the donor's shares in the company. The income of his property (*les revenus des biens qui font partie de ma succession*) was to be divided between his children and grandchildren, with an ultimate gift of the capital to his great grandchildren. The material clauses of the will were as follows:—

IL est bien entendu que mon légataire fiduciaire partagera avec mes autres enfants les revenus de mes dits biens, mais les revenus de mes dits biens ne seront partagés entre mes dits enfants ou petits-enfants, et arrière petits-enfants, s'il y a lieu, que lorsque mon légataire fiduciaire jugera à propos de le faire, car je le laisse le seul juge de l'état de ma fortune et je lui donne à lui seul pouvoir de déclarer et décider que mes biens, tant ceux qui me sont personnnels que ceux qui consistent en actions dans le fonds capital de LA PRESSE PUBLISHING COMPANY LIMITED sont dans un état tel que les fruits et revenus peuvent être distribués sans qu'ils en soient affecté.

MON légataire fiduciaire aura le droit de retirer des salaires, traitements ou rémunérations qu'il pourrait s'attribuer comme

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directeur ou président ou à quelque titre que ce soit de LA PRESSE PUBLISHING COY. LTD. ou que la dite compagnie pourrait lui attribuer pourvu que la somme ainsi reçue annuellement ne dépasse pas douze mille dollars, mais survenant le décès d'un ou de plusieurs de mes enfants je veux que sa part ou leur part de revenus soit dévolue à son ou à leur enfants, et s'il n'a pas ou n'ont pas d'enfants sa part ou leurs parts retournera à ses frères et soeurs, mais s'il a des enfants ceux-ci représenteront leur père ou mère et retireront les revenus suivant leurs droits de ceux qu'ils représenteront, et s'ils meurent en minorité et sans postérité leur part de revenus sera distribuée à mes enfants survivant ou aux enfants de mes enfants, mais si un de mes petits enfants décède sans postérité sa part de revenus sera dévolue à mes enfants ou à leurs défaut à mes autres petits enfants ou à leur défaut à mes arrières petits-enfants, car je veux que le revenu de mes biens soit toujours partagé, lorsqu'il y aura lieu, entre mes descendants et ceux de mes enfants, pourvu toujours qu'un de mes petits enfants ou de mes arrières petits enfants ne puisse prétendre aux revenus de ma succession du vivant de son père ou de sa mère suivant le cas.

QUANT à la propriété de mes biens, je la donne et lègue et elle appartiendra à mes arrière petits-enfants qui existeront lorsque mes enfants et leurs enfants seront tous décédés, et alors le partage s'en fera entre mes arrière petits-enfants par souche et non par tête.

TOUS les biens ainsi que les revenus que je donne et lègue par mon présent testament seront insaisissables et sont donnés à titre d'aliment.

On December 26, 1914, by a notarial deed (called in this judgment "the deed of gift") the donor gave, ceded and assigned to Arthur Berthiaume, advocate, Joseph R. Mainville, notary, Zenon Fontaine, advocate, as donees in trust (*donataires fiduciaires*) 7400 common shares in the capital of the company. He reserved to himself during his life the usufruct and the enjoyment (*l'usufruit et la jouissance*), of the property so given, including the right of voting in respect of the said shares, and he declared that the trust thus created would come to an end

upon the death of the last of his children. The following passages in the deed of gift are of importance :—

" Les donataires fiduciaires partageront les fruits et revenus que pourront produire les dits biens lorsqu'ils jugeront que ces fruits et ces revenus peuvent être partagés et distribués sans affecter les dits biens, mais le dividende de sept pour cent sur les actions privilégiées dans le susdit fonds social devra être prélevé et payé aux ayants-droit avant qu'un dividende ne soit prélevé et payé sur les actions communes. Le dividende sur les actions communes, s'il y en a, sera partagé comme suit : cinq sixièmes seront distribués aux ayants-droit plus loin nommés et l'autre sixième sera distribué aux fiduciaires à titre d'indemnité pour leur administration et gestion.

" Lorsque l'usufruit que le donateur se réserve se terminera les cinq-sixièmes des fruits et revenus des biens présentement donnés seront partagés de la manière suivante : tous les enfants du donateur au premier degré ou leurs héritiers légaux en cas de prédécès recevront une part égale des fruits et revenus que les fiduciaires pourront retirer, et les dits fruits et revenus seront payables de la manière et aux époques que choisiront les fiduciaires."

" Si l'un des susdits enfants du donateur décède sans enfants, sa part de revenus accroîtra aux survivants de ses frères et soeurs et aux représentants de ceux qui seront prédécèdés suivant l'ordre des successions légitimes. Si à son décès il laisse des enfants ou descendants, ceux-ci remplaceront leur père, mère ou ascendants suivant l'ordre des successions légitimes quant à la part de ceux-ci dans les derniers revenus."

" Les biens ainsi donnés aux fiduciaires seront remis et appartiendront aux descendants du donateur qui existeront à la mort du dernier des susdits enfants du premier degré et seront partagés de la manière suivante : ".

It was the usual practice of the directors of the company to declare dividends at quarterly periods, and in particular to declare a dividend a day or two before January 1 ; there was, however, no express regulation in the letters patent of the company as to the periods or dates at which dividends should be declared or paid. The company was a very prosperous one, and possessed a considerable reserve fund. On December 27, 1933, the board of directors declared a dividend of 1¾ per cent. on the preference shares of the company and of 12 per cent. on the ordinary shares, both payable on January 2, 1934. The last preceding declaration of dividend had been made on October 26, 1933. The dividends declared on December 27 were in fact being declared and paid out of profits earned before December 24. There was no statement in the declaration as to the period in respect of which the dividends were to be paid.

The testator died shortly after the execution of the deed of gift. One of his sons, namely, the said Edouard Berthiaume, the husband of the appellant, as already stated, died on December 24, 1933, and under his will the appellant is his executrix and universal legatee. It is in that capacity that she claims in right of her late husband the share of the dividends which, according to her contention, were due to her husband under the said will and deed of gift. The respondents dispute this claim on two grounds, first, because under the terms of the instruments the trustees were to distribute, at their discretion as to time and amount, but only after receipt by them, the dividends paid in respect of the said shares to the children or grandchildren then living, and, secondly, because the dividends in question ought not to be deemed to accrue from day to day and are not governed by art. 451 of the Civil Code of Quebec.

For the sake of clearness it may be well to add that the whole of the common shares (except the 100 bequeathed to Arthur Berthiaume) passed by the deed of gift, while the preference shares, or the greater part of them, passed by the will of the donor. The terms of the will and of the deed of gift are different in many respects, and the persons ultimately entitled under these instruments, as appears from the above, are different; but it has not been suggested in the Courts below, nor was it suggested before their Lordships, that there is any ground for coming to a different conclusion with regard to the dividend on the preference shares than that which is a correct decision with regard to dividend on the ordinary shares.

Their Lordships think it desirable here to make two preliminary observations. In the first place, it is clear that the questions involved ultimately turn on the true construction of the will and the deed of gift, since the appellant can have no claim except one founded on those instruments. The true nature of the main contest is this :—Has the donor used expressions which indicate with reasonable certainty that his son Edouard Berthiaume was not to have any right or title to share in any dividends which had not been paid, or, alternatively, which had not been declared, before his death on December 24, 1933, or, on the other hand, if this part of the question is answered by saying that there are not such expressions, has the donor, by giving to Edouard Berthiaume a certain share in the fruits and revenues produced by the shares, indicated by the words which he has used that Edouard was to be entitled to his portion of the dividends earned before his death but not declared till December 27, 1933, and not made payable till January 2, 1934 ? The first part of the question may be described as depending on a particular or a special intention of the donor : the second part may be said to depend on his general intention, and on the view which ought to be taken on the legal point as to whether the dividends of the company ought to be deemed to be acquired day by day, that is, whether they ought, according to the English phrase, to be apportioned. The second remark is this, that the only claim of the appellant is in right of her late husband, and this claim must stand or fall by the determination of the question whether or not Edouard Berthiaume was entitled at the date of his death to his due portion of the dividends which were in fact declared three days after his death.

Upon the question of the true construction of the will and of the deed of gift there has been in the Court of King's Bench (Appeal Side) a striking difference of opinion. Galipeault J., with whose judgment Bond J. agreed, took the view that the donor's intention was simply to maintain his descendants, and that he never contemplated that any part of the fruits and revenues bequeathed or given to his children could belong to the widow of a child. St. Jacques J. came to a like result by holding that the trustees were not effectively seized (*saisis*) of the dividends until they were paid by the company, and that it was only then that the beneficiaries, according to the true construction of the will and deed of gift, were entitled to share in the dividends. These conclusions would have the advantage of making it unnecessary to decide some difficult questions in relation to the Civil Code of Quebec, but their Lordships, like Duclos J., the Trial Judge, and Dorion and St. Germain JJ., find it difficult to accept them. The question of construction is a delicate one, largely because the donor in the deed of gift, as St. Germain J. pointed out, has confused the rights and functions of his trustees with those of the directors of the company; but it seems to their Lordships that upon the true construction of both documents the donor after his death has given the whole of the revenue or income of the property, whatever that may be, by the description of *revenus* in the will and of *fruits et revenus* in the deed of gift (subject to the deduction of one-sixth) to the legatees he has mentioned as above stated. The circumstance that the trustees have a discretion as to the times of distribution, and that the revenues so distributable are to be *insaisissables* and *sont donnés à titre aliment*, or are to be so considered, are insufficient to qualify the plain direction that (in the will) the trustee shall divide with the testator's other children the revenues of his property, and that (in the deed of gift) the dividends on the common shares shall be divided as to five-sixths among those entitled, and as to the other one-sixth among the trustees as a recompense for their services (*à titre d'indemnité pour leur administration et gestion*). Again, the donor (in the deed of gift) directs that the five-sixths of the *fruits et revenus* shall be divided, when the usufruct reserved by the donor comes to an end, as follows: "all the children of the donor in the first degree . . . . shall receive an equal part of the fruits and revenues which the trustees can draw out, and the said fruits and revenues shall

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be payable in the manner and at the times which the trustees shall choose." The direction in the deed that all the children during their joint lives are to receive *une part égale* is unequivocal, and it is plain that any provision not leading to exact equality might lead to difficulty in the family since one of the trustees was himself a beneficiary, and a discretion to postpone payment to a brother or sister if such postponement might benefit a trustee would be not unlikely to cause trouble. On the other hand, the circumstance that the income of the common shares was being given as to one-sixth among the trustees as a recompense for their services tends in the same direction, for it seems at least unlikely that the donor would have wished a trustee dying shortly before the declaration or payment of a dividend to have no remuneration for the period which had elapsed since the last declaration or payment. These considerations are indeed of no great weight. The decisive clause is the direction to divide the fruits and revenues in equal shares, taken together with the fact that there is nothing expressed in the deed of gift which suggests that a child's right to a share of dividend is to be lost because of some accidental delay in the declaration or the payment of a dividend.

Their Lordships, therefore, are unable to take the view that the respondents can succeed on the contention that the donor has manifested what they have termed the particular intention. But this by no means concludes the matter. It is undeniable that in fact dividends of a limited company do not accrue day by day, and that until a dividend is actually declared there is no debt due by the company to the shareholder, his right while the company is a going concern being merely to share in such of its profits as shall be legally declared as dividend whilst he is a shareholder. From this it is evident that, in the absence of any special direction in the deed of gift, the appellant cannot succeed unless she can establish that, according to the law of Quebec, as applied to the provisions of the will and deed of gift, the dividends in question must be deemed or considered as accruing from day to day. The contention put

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forward on her behalf is in fact based on art. 451 of the Civil Code of Quebec which, in the English translation, reads thus: "Civil fruits are considered to be acquired day by day, and belong to the usufructuary in proportion to the duration of usufruct." Here, however, arise some further difficulties. The article is found in a section dealing with usufructuaries and their rights and liabilities, and the first question that arises is whether the children of the donor are usufructuaries. The second question is whether dividends in joint stock companies can in any circumstances properly be described or considered as "civil fruits" within the meaning of art. 451. If the first question be answered in the negative, and the second in the affirmative, a third and final question arises:—Is art. 451 applicable by analogy to civil fruits enjoyed under the will and deed of gift by the children of the donor?

In considering these questions, on which there has been a divergence of opinion in the Canadian Courts, the following articles of the Civil Code of Quebec are the most material:—

443. "Usufruct is the right of enjoying things of which another has the ownership, as the proprietor himself, but subject to the obligation of preserving the substance thereof.

447. The usufructuary has the right to enjoy every kind of fruits, whether natural, industrial or civil, which the thing subject to the usufruct can produce.

448. Natural fruits are those which are the spontaneous produce of the soil. The produce and the increase of animals are also natural fruits.

The industrial fruits of the soil are those obtained by the cultivation or working thereof.

449. Civil fruits are the rent of houses, interest of sums due and arrears of rents. The rent due for the lease of farms is also included in the class of civil fruits.

450. Natural and industrial fruits attached by branches or roots, at the moment when the usufruct is open, belong to the usufructuary.

Those in the same condition at the moment when the usufruct ceases belong to the proprietor, without recompense on either side for ploughing or sowing, but also without prejudice to the portion of the fruits which may be acquired by a farmer on shares, if there be one at the commencement or at the termination of the usufruct.

451. Civil fruits are considered to be acquired day by day, and belong to the usufructuary in proportion to the duration of his usufruct.

This rule applies to rent from the lease of farms, as it does to the rent of houses and to other civil fruits."

The Civil Code of Quebec must, no doubt, be construed according to the principles laid down in *McArthur* v. *Dominion Cartridge Co.* (1); *Maclaren* v. *Attorney-General for Quebec* (2); and *Quebec Railway, Light, Heat and Power Co.* v. *Vandry.* (3) The conclusions of French Courts or French jurists upon articles of a Code similar, if not identical, with those in the Civil Code now under consideration, though entitled to great respect, are not of binding authority in Quebec. The Civil Code of Quebec, as Lord Sumner pointed out in the last cited case, is in the language of a legislature established within the British Empire. Further, it must not be forgotten that the enactment is a Code of "systematized principles and rules, not a body of administrative directions or an institutional exposition." It follows that there are many legal rights and obligations not precisely within any article of the Code, more particularly in relation to systems and methods of carrying on business, and to inventions and innovations, which had never even been thought of at the time when the text was originally put into a written form. In these cases, if there is no modern legislation which applies, it is necessary for a Court, in many cases, to apply the principles of the Code by way of analogy. It may be remarked that the articles of the Code Napoléon relating to usufruct, copied in substance word for word in the Civil Code of Quebec, were first decreed in the year 1804, and that some of them were taken directly from the Institutes of Justinian (Lib. II., Tit. IV.). One must not expect, in the absence of a modern statute, to find in the language of the sections dealing with usufruct anything referring to the profits of a trade or a partnership, still less to the dividends arising from shares in a modern company.

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(1) [1905] A. C. 72, 77.
(2) [1914] A. C. 258, 279.
(3) [1920] A. C. 662.

The definition of a usufruct has not varied since the time of Justinian :—" *Usufructus est jus in alienis rebus utendi fruendi salvâ rerum substantiâ.*" Art. 443 of the Quebec Code is taken from art. 578 of the Code Napoléon and is in these terms :—" *L'usufruit est le droit de jouir des choses dont un autre a la propriété, comme le propriétaire lui-même, mais à la charge d'en conserver la substance.*" The usufructuary can himself make use of the property, which may consist of moveables or immoveables (art. 446) and he may also enjoy the fruits of the property. The French version of art. 447 is in the following words :—" *L'usufruitier a droit de jouir de toute espèce de fruits, soit naturels, soit industriels, soit civils, que peut produire l'objet dont il a l'usufruit.*" It is not in doubt that this article is dealing only with the " fruits," and that the usufructuary has also the right to the use in a wide sense of the property—e.g., the right to live in a house, or to ride a horse ; but so far as fruits or revenues are concerned, they must be within art. 447, directly or by analogy, and accordingly must be classed as *naturels* or *industriels* or as *civils*. Nothing turns upon the differences between the first two categories, but it is important to distinguish between these two and the third category since by the express terms of art. 451 (already cited) " *les fruits civils sont réputés s'acquérir jour par jour, et appartiennent à l'usufruitier à raison de la durée de son usufruit.*" A very different rule applies under art. 450 to natural and industrial fruits.

Their Lordships will now proceed to deal with the three questions above defined. On the first of them their Lordships entertain no doubt. The children of the donor are not usufructuaries under the deed of gift. All they have is a right as beneficiaries to share in certain " fruits and revenues " distributed from time to time by the trustees. Plainly they have no direct interest as shareholders, and neither a right of attending meetings, nor of voting. And, as St. Germain J. points out in his judgment, a donee or legatee of a usufruct has a real right in respect of the property, whilst the donee or legatee of the income paid or payable by trustees has only a personal action against the trustees. On the other hand, it has not been contended that the donor did not retain, as he plainly stated he did, a usufruct in relation to the 7400 common shares with the full right of enjoying that property.

The second question presents more difficulty. It is desirable in the first place to consider whether a person having usufruct of shares in a Canadian company is entitled to the dividends on such shares and whether such dividends are to be considered as civil fruits and therefore as being acquired from day to day.

There is now no doubt that dividends of a limited company according to the law of Quebec are " fruits " to which the usufructuary is entitled. It is true that dividends of trading concerns are not mentioned in any of the relevant articles; they did not exist when the articles of the Code Napoléon, from which arts. 447 to 478 of the Quebec Code were taken, were framed; but it has long been settled law both in France and in the Province of Quebec that all moneys produced periodically, whether at fixed or at uncertain dates, without exhausting or reducing the capital of the enterprise or business are " fruits " to which the usufructuary in general has a lawful claim. There has been a contest between jurists whether such dividends ought to be classified as industrial or as civil fruits. The numerous authorities cited by Duclos J. in his careful and exhaustive judgment on this part of the case present a very strong body of juristic opinion in favour of the view that such dividends are civil fruits. They clearly are not natural fruits, which are those which the soil produces, and the increase of animals. It should be mentioned that the Code Napoléon (art. 583) defines industrial fruits as follows:—"*Les fruits industriels d'un fonds sont ceux qu'on obtient par la culture.*" The Civil Code of Quebec (art. 448) added to this sentence the words

"*ou l'exploitation,*" and without this addition there could be little foundation for the suggestion that dividends are to be classed as industrial fruits. In the English version the words are translated "or working thereof," meaning "of the soil." Their Lordships cannot take the view that the addition was intended radically to alter the nature of industrial fruits, particularly having regard to the wording of art. 450 which by its reference to "branches or roots" tends strongly to support the view that industrial fruits are derived from the cultivation or other use of the soil, not being the spontaneous produce of the soil. The words of art. 449, though they certainly do not mention either dividends of a company or periodical distributions of the profits of a trade or a partnership, are much more easily extended by analogy to include such periodical payments. It is true that the jurists cited by Duclos J. are nearly all of them French jurists dealing with the almost identical provisions of the Code Napoléon (arts. 582 to 586); but their opinions have great persuasive force, and their Lordships have noted that Mignault J., whose authority as a writer on the *Droit Civil Canadien* is indisputable, has taken the same view. The passage is to be found in a note to p. 552 of vol. II. (published in 1896): "Les fruits civils ne sont point toujours *réguliers* dans leur perception: souvent leur *quantum* varie avec les différentes époques de l'année. Ainsi, les actions sur les ponts et canaux, les actions de chemins de fer, ont leur bonne saison et leur saison morte. Comment procéder alors, si l'usufruit n'a duré qu'une fraction d'année? Faut-il attribuer à l'usufruitier la recette corrélative au temps pendant lequel a duré son usufruit? Cette attribution ne serait pas juste: elle donnerait trop ou ne donnerait pas assez à l'usufruitier."
He, therefore, decides in favour of an apportionment.

Their Lordships have not omitted to note that an eminent French writer, M. Demolombe (vol. 10, ss. 280, 281), writing in 1875, expressed a contrary opinion, though not in a very confident manner; but his view, based only on the absence of anything in the Code justifying the recovering

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of an apportioned part of a dividend from the owner or from a subsequent usufructuary, has not been followed in France; and it was not accepted by Mignault J., writing in 1896, as the law of Quebec.

Their Lordships, therefore, agree with the opinions on this point expressed by Duclos J. and in the Court of King's Bench by St. Germain J. that dividends paid out of the profits of industrial companies, declared periodically as far as circumstances permit, are generally speaking to be treated as "civil fruits" within art. 449 of the Civil Code. On this view the dividends, pursuant to art. 451, must be considered as having been acquired day by day and belong to the usufructuary in proportion to the duration of his usufruct. A passage from Laurent, the well-known French jurist, may be cited as an example of the way in which the French authorities mentioned by the Trial Judge deal with the matter: "Quant aux intérêts et dividendes que les sociétés industrielles et commerciales payent aux actionnaires, il se présente d'autres difficultés. Il va sans dire que l'usufruitier a droit aux intérêts et dividendes, puisque c'est un fruit civil, et il y a droit à raison de la durée de sa jouissance; peu importe le moment où les intérêts et dividendes se payent. Ce payement se fait d'ordinaire plusieurs mois après la fin de l'exercice pour lequel l'actionnaire y a droit. Cela n'empêche pas que l'usufruitier ne gagne les intérêts et dividendes jour par jour. Il y a analogie complète entre ces revenus et les fermages, et là où il y a identité de motifs, la décision doit être la même." (LAURENT, Principes de Droit Civil Français, vol. 6, No. 402.)

If, then, the children of the donor had been usufructuaries their Lordships would have found not much difficulty in deciding the appeal in favour of the appellant. Since they were not usufructuaries the question arises as to what was their true legal position. The Civil Code of Quebec had originally no articles relating to trusts, and generally speaking the French system does not recognize trusts. In Quebec, however, their great convenience was recognized some fifty years ago and art. 981 (*a*) to (*n*) were added to the Code.

(See Revised Statutes of Quebec, 1888, art. 5803.) It may be useful to add that the English law relating to trusts and trustees was only adopted to the limited extent involved in those specific provisions and of any implications necessarily flowing from them. The English system of Equity was clearly not introduced. In view of those sections, however, there can be no reason for doubting that the true position of the children, including Edouard Berthiaume, after the death of the donor, was that they were beneficiaries under the deed of gift and under the will, with personal rights against the fiduciary donees (*donataires fiduciaires*) in the case of the deed, and the fiduciary legatee (*légataire fiduciaire*) in the case of the will.

In considering the final question which now remains for consideration, whether art. 451 can properly be considered as applicable to the rights of a beneficiary under the deed of gift and the will in respect of the dividends of the company declared on December 27, 1933, it is expedient to repeat that the donor has declared that the fruits and revenues (*les fruits et revenus*) of the shares are to be divided among the persons entitled, and that when the usufruct of the donor shall terminate the fruits and revenues of the shares shall be divided in the manner stated. It is clear that by his repeated reference to *fruits*, the donor was using a word that might well suggest the application of the principle formulated in art. 451. The donor himself, as a usufructuary, was bound by the article, and that again points to the conclusion that, if the trustees for his children were to have the obligation of accounting for a proportion of the dividends declared after the death of the donor out of profits accrued during his lifetime, a similar rule was to be applied to their interests as beneficiaries. Nor is there any sound reason for applying in such a case as the present, where the dividend has to be distributed by trustees, any rule as to these "fruits and revenues" differing from that which applies to the civil fruits of a usufruct. Their Lordships must, therefore, agree with the opinions of Duclos J. and of Dorion and St. Germain JJ. that the dividends in question must be considered as

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fruits civils and treated as subject to the principle contained in art. 451. Their Lordships note with interest that a similar conclusion has been reached in a recent case in the Court of Cassation in France which will be found reported in Dalloz, Jurisprudence Générale, for 1933, p. 100. No question of a usufruct was involved. The headnote relating to the relevant part of the case, and taken verbatim from the formal decree, is as follows : " Les bénéfices des sociétés commerciales, dans la mesure où, d'après les statuts, ils doivent être répartis périodiquement entre les ayants droit, participent de la nature des fruits civils, auxquels il y a lieu de les assimiler en ce qu'ils sont réputés s'acquérir jour par jour au cours de chaque exercice social." This decision affirmed a judgment of the Court of Appeal of Limoges, and is explained and approved in a learned note signed by Professor Paul Cordonnier in which a large number of authorities in the same sense are cited. The case is not in any sense an authority on a question of the law of Quebec, even though the relevant sections of the two Codes are virtually the same. Their Lordships, however, are of opinion that the principle should be followed in Quebec, in the absence of any contrary direction express or implied in cases where shares are held in trust for beneficiaries in succession, the rule being limited to cases where the dividends are those of a company which either by established usage or by its articles of association or statutes makes an annual or other periodical distribution of dividends if the circumstances permit. It is hardly necessary to add that the rule has no reference to reserves if not made use of for the purposes of dividend during the relevant period, and in no way touches the effect of purchases and sales of shares whether privately or in the market. It will be noted that the objection above referred to raised by Demolombe, as regards the difficulty of justifying the recovery from a proprietor or a usufructuary of a proportion of a dividend received by him during the period of his ownership or his usufruct, has no application in the case where the shares are held by trustees and the dividends have to be distributed by them according to the legal rights of the beneficiaries.

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For the reasons above given their Lordships are of opinion that the appeal should be allowed, with costs, subject to a small adjustment in the amount. The appellant has contended that there is no apportionment to make because it was admitted in the evidence of the secretary of the company that the dividends declared on December 27, 1933, were earned on or before December 24. This contention is unsound. The dividends are not in fact earned for the present purpose at any particular period, and the result would have been the same if they had been declared out of a reserve fund available for the purpose but earned many years previously. Following the words of art. 451 they are "*considered* to be acquired day by day"; and on the facts of the present case they must be considered as having been acquired up to December 27, when the declaration was made, since there is nothing in the declaration to the contrary. An apportionment is therefore necessary in respect of these three days. The figures can doubtless be agreed, and will be inserted in the formal Order in Council. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

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March 12.

TATA HYDRO-ELECTRIC AGENCIES, LIMITED, BOMBAY . . . . . APPELLANTS;

AND

COMMISSIONER OF INCOME TAX, BOMBAY PRESIDENCY AND ADEN RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

India—Revenue—Income-tax—Agency business—Acquired by assignment—Subject to liability under existing agreements to pay percentage of commission to third parties—Payment not expenditure incurred solely for the purpose of earning profits—Not deductible in computing profits and gains—Obligation undertaken in consideration of acquisition of right to earn profits—Indian Income-tax Act (*XI. of* 1922), *s.* 10, *sub-s.* 2 (*ix.*).

The appellants, a private limited company, who carried on the business of managing agents of A. company, receiving for their services a commission of 10 per cent. on the annual net profits of A. company, with a minimum of Rs.50,000 whether that company should make any profits or not, had acquired that agency from B. company, their predecessors, under an assignment whereby B. company transferred to the appellants their whole rights and interest as agents of A. company, subject, however, to their (B. company's) obligations under two agreements with D. and E. respectively whereby B. company, who while the managing agents of A. company had borrowed money for that company from D. and E., had to pay to both D. and E., in addition to the interest they would receive from A. company on the loan, 12½ per cent. of the commission earned by them (B. company) under their agency agreement with A. company:—

Held, that in computing their income, profits and gains for tax purposes the appellants were not entitled to deduct the 25 per cent. of the commission earned and received from A. company which they paid over to D. and E. under the agreements. That percentage of the commission paid to D. and E. was not expenditure incurred by the appellants "solely for the purpose of earning . . . . profits or gains" of their business within the meaning of s. 10, sub-s. 2 (ix.), of the Indian Income-tax Act, 1922. The obligation to make the payments was undertaken by the appellants in consideration of their acquisition of the right and opportunity to earn profits, that was, of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business.

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* *Present:* LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and SIR JOHN WALLIS.

Dicta of the Lord President (Clyde) in *Robert Addie & Sons' Collieries, Ld.* v. *Commissioners of Inland Revenue* (1924) S. C. 231, 235, adopted and applied.

Judgment of the High Court affirmed.

APPEAL (No. 46 of 1936) from a judgment of the High Court (March 27, 1935) upon a reference made under s. 66, sub-s. 2, of the Indian Income-tax Act, 1922.

The appellant company, Tata Hydro-Electric Agencies, Ld., Bombay, were a private limited company who carried on business as the managing agents of the Tata Power Co., Ld., and of three other electric power companies in India. The questions referred to the High Court arose in the course of the assessment of the income of the appellants for the year of assessment ending on March 31, 1934, and were as follows :—

" (1.) Whether in the circumstances of the case and in view of the provisions of s. 4, sub-s. 1, and s. 10 of the Act, the assessee company has been correctly assessed on the total amount of Rs.5,17,288 received by it as profits and gains of the business carried on by it as the managing agents of the Tata Power Co., Ld.

(2.) Whether under the provisions of s. 10 of the Act or under any other provisions thereof, the assessee company is entitled to have a deduction from the said profits and gains amounting to Rs.5,17,288 to the extent of Rs.1,29,322 paid by it to certain parties under the agreements, exhibits F and G [being agreements between the appellants and F. E. Dinshaw Ld. and Richard Tilden Smith's administrator respectively, as below mentioned] on the ground that this latter amount was nothing but expenditure incurred solely for the purpose of earning the said profits or gains or on any other ground."

The appellants had acquired their agency business by assignment from their predecessors, Tata Sons, Ld., subject to the above mentioned agreements by which their predecessors, who had borrowed money for the Tata Power Co., Ld., from F. E. Dinshaw Ld. and Richard Tilden Smith, had agreed to pay to the lenders, in addition to the interest payable on the loans by the Tata Power Co., Ld., 12½ per cent.

of the commission which they, Tata Sons, Ld., received from the Tata Power Co., Ld. The question in this appeal was whether that 25 per cent. of the commission which the appellants paid was " expenditure incurred solely for the purpose of earning . . . . profits or gains " within the meaning of s. 10, sub-s. 2 (ix.), of the Indian Income-tax Act, 1922, so as to entitle them to deduct it in computing their profits or gains for tax purposes.

The facts appear fully from the judgment of the Judicial Committee.

The High Court (Sir John Beaumont C.J. and Rangnekar J.) answered the questions referred adversely to the appellant company.

1937. Jan. 26, 28, 29. *Needham K.C.*, *Reginald Hills* and *Ralph Parikh* for the appellants. The payments made by the appellants to F. E. Dinshaw Ld. and the administrator of Richard Tilden Smith did not form part of the appellants' income and ought not to have been taken into account in computing for the purpose of income-tax the profits of their business of managing agents. The payments were not and did not represent part of the profits of the appellants' business, but were payments of or out of the gross revenue received by the appellants from one of the sources of revenue of the business—namely, a particular agency for a particular principal. What the appellants obtained under the assignment to them of the agency agreement by Tata Sons, Ld., was not the whole commission payable by the Tata Power Co., Ld., to their agents but only three-fourths of that commission. The payments were in any event necessary expenditure of the appellants in carrying on their business as managing agents and earning the profits of the business. Tata Sons, Ld., could have deducted for tax purposes the amount they paid to the lenders from the remuneration they received from Tata Power Co., Ld. There must be a connecting link between the payments and the making of profits, and there is one here. The facts in *Commissioner of Income-tax, Bombay* v. *C.*

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Macdonald & Co. (1) are distinguishable from those in the present case, and the High Court ought not to have held itself bound by its previous decision in that case. The difference between s. 10 of the Indian Income-tax Act (XI. of 1922) and Sch. D, r. 3, of the Income Tax Act, 1918, is merely one of words; they are to the same effect. [Reference was also made to *Pondicherry Ry. Co.* v. *Commissioner of Income-tax, Madras* (2); *Bharat Insurance Co.* v. *Income-tax Commissioner* (3); *Last* v. *London Assurance Corporation* (4); *Bejoy Singh Dudhuria* v. *Income-tax Commissioner* (5); *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (6); *British Insulated and Helsby Cables* v. *Atherton* (7); *Mallett* v. *Staveley Coal and Iron Co.* (8); *Moore* v. *Stewarts & Lloyds, Ld.* (9); and *Van Den Berghs, Ld.* v. *Clark.* (10)] There are ample facts in the documents and in the statement of facts by the Commissioner which would enable the Court to find that the expenditure in question was necessarily incurred in earning profits.

Hubert Hull for the respondent. Reliance is not placed on *Pondicherry Ry. Co., Ld.* v. *Commissioner of Income-tax, Madras* (2) as covering the question here. The first step is to consider the nature of the obligation under which the disputed disbursement was made; secondly, the purposes for which the paying company entered into the obligation. In answering the first question it is irrelevant to consider the position of the appellants' predecessors, Tata Sons, Ld., at all. The answer to the question under what obligation they had to pay Dinshaw Ld. and R. T. Smith must be because they had covenanted to do so in 1932. But the appellants did not undertake the obligation with the object of providing funds for Tata Power Co., Ld.; they undertook the obligation as necessary to enable them to acquire the agency. They would not have got the business unless they had undertaken the obligation. They did not make the payments to get the commission but to get the business which earned the commission. The strongest case

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(1) (1934) 37 Bom. L. Rptr. 126.
(2) (1931) L. R. 58 I. A. 239.
(3) (1933) L. R. 61 I. A. 41.
(4) (1885) 10 App. Cas. 438.
(5) (1933) L. R. 60 I. A. 196.
(6) [1915] A. C. 433.
(7) [1926] A. C. 205.
(8) [1928] 2 K. B. 405.
(9) (1906) 6 Tax Cas. 501.
(10) [1935] A. C. 431, 441.

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against the respondent is *Moore* v. *Stewarts & Lloyds, Ld.* (1); but in that case there was a finding of fact that the payments were made for the purpose of earning the profits, and that distinguishes it from the present case. The *Pondicherry* case (2) decided that a payment which depended on the making of profits was not a payment to earn profits. In the present case the payment by the appellant company was not expenditure incurred, whether solely or at all, for the purpose of earning the profits or gains brought under charge, or for the purpose of earning any profits or gains. [Reference was also made to *Commissioner of Inland Revenue* v. *Paterson* (3); *Union Cold Storage Co., Ld.* v. *Adamson (H.M. Inspector of Taxes)* (4); *Bejoy Singh Dudhuria* v. *Income-tax Commissioner* (5); and *Currimbhoy Ebrahim Baronetcy Trustees* v. *Income-tax Commissioner* (6).]

Needham K.C. replied.

March 12. The judgment of their Lordships was delivered by LORD MACMILLAN. The appellants are a private limited company who carry on the business of managing agents of the Tata Power Co., Ld., and of certain other hydro-electric companies in India. They acquired this agency business from their predecessors, Tata Sons, Ld., under an assignment dated November 21, 1929, whereby Tata Sons, Ld., transferred to the appellants their whole rights and interest as agents of the hydro-electric companies under their subsisting agreements with these companies, but subject, as to their rights and interest under their agreement with the Tata Power Co., Ld., to their obligations under two agreements with F. E. Dinshaw, Ld., and Richard Tilden Smith respectively. The assignment was declared to be to the intent that the appellants should thenceforth be and act as the agents of the hydro-electric companies and be entitled to all benefits and advantages contained in and conferred by the agreements between Tata Sons, Ld., and these companies, and should perform and be bound by all the obligations and duties thereby imposed, and further, that the appellants should receive all commissions and other remuneration to which Tata Sons, Ld., were entitled thereunder. The appellants for their part covenanted to carry out and perform the terms and conditions of the agreements with F. E. Dinshaw Ld. and Richard Tilden Smith, and to indemnify Tata Sons, Ld., against any consequences of the non-observance thereof. They further undertook, if so required, to enter into separate agreements in their own names with F. E. Dinshaw Ld. and Richard Tilden Smith in the same terms.

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(1) (1906) 6 Tax Cas. 501.
(2) (1931) L. R. 58 I. A. 239.
(3) (1924) 9 Tax Cas. 163.
(4) (1931) 16 Tax Cas. 293.
(5) (1933) L. R. 60 I. A. 196.
(6) (1934) L. R. 61 I. A. 209.

Under the agency agreement between Tata Sons, Ld., and the Tata Power Co., Ld., which was dated September 24, 1919, and the benefit of which the appellants thus acquired, the remuneration of Tata Sons, Ld., for their services consisted of a commission of 10 per cent. on the annual net profits of the Tata Power Co., Ld., with a minimum of Rs.50,000 whether that company should make any profits or not, and they were also entitled to have their expenses reimbursed. In return for this remuneration Tata Sons, Ld., undertook to use their best endeavours to promote the interests of the Tata Power Co., Ld. The agreement was declared to be assignable, and the Tata Power Co., Ld., undertook to recognize any assignees as their agents and, if required, to enter into an identical agency agreement with such assignees. It was also declared to be lawful for Tata Sons, Ld., to assign the whole or any part of their earnings under the agreement.

It appears that in 1926 the Tata Power Co., Ld., were urgently in need of financial assistance to the extent of over a crore of rupees. Tata Sons, Ld., their then managing agents, who, as the Commissioner of Income-tax puts it in his statement of facts, " had to find the money," approached F. E. Dinshaw Ld. and Richard Tilden Smith, who agreed to provide the necessary funds. One of the conditions on which they agreed to do so was that, in addition to the interest payable by the Tata Power Co., Ld., for the loan, they should each receive from Tata Sons, Ld., two annas in the rupee, or 12½ per cent., of the commission earned by Tata Sons, Ld., under their agency agreement with the Tata Power Co., Ld. Two agreements embodying this obligation were entered into between Tata Sons, Ld., and F. E. Dinshaw Ld. and Richard Tilden Smith respectively, dated October 15 and 19, 1926, being the agreements referred to in the assignment by Tata Sons, Ld., of their agency business to the appellants. It will be observed that as the remuneration of Tata Sons, Ld., depended, subject to a minimum, on the prosperity of the Tata Power Co., Ld., they had an interest in assisting the Tata Power Co., Ld., to obtain the financial accommodation required for the conduct of their business.

After the acquisition of the agency business by the appellants the Tata Power Co., Ld., in fulfilment of their obligation under their agreement with Tata Sons, Ld., entered into a new agency agreement with the appellants, dated December 17, 1929, in terms identical with those of their previous agreement with Tata Sons, Ld., and the appellants also entered into agreements with F. E. Dinshaw Ld. and the administrator of the estate of Richard Tilden Smith (who had meantime died), dated February 23 and May 19, 1932, respectively, in terms identical with those of the previous agreements between Tata Sons, Ld., and these parties.

By this series of transactions complete novation was effected, with the result that the appellants came in room and place of Tata Sons, Ld., in all respects both as regards the right to receive from the Tata Power Co., Ld., the stipulated agency remuneration, and as regards the obligation to pay out of that remuneration 12½ per cent. to F. E. Dinshaw Ld., and 12½ per cent. to Richard Tilden Smith's administrator.

In the year 1932 the appellants duly earned and received payment from the Tata Power Company of their commission of 10 per cent. on the net profits of that company and duly paid over to F. E. Dinshaw Ld., and to Richard Tilden Smith's administrator 12½ per cent. thereof each, or 25 per cent. in all.

The assessment of the appellants' income for tax purposes for the fiscal year to March 31, 1934, which is in question in the present appeal, is based on their income, profits and gains for the year 1932, and the question is whether in the computation for tax purposes of their income, profits and gains for that

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year they are entitled to deduct a sum representing the 25 per cent. of the commission earned and received from the Tata Power Co., Ld., which they paid over to F. E. Dinshaw Ld. and Richard Tilden Smith's administrator under the agreements above mentioned. The gross commission received by the appellants was Rs.5,17,288, and the one-fourth thereof which they claimed to deduct was Rs.1,29,322.

Under s. 10, sub-s. 2, of the Indian Income-tax Act the profits or gains of any business carried on by the assessee are to be computed after making allowance for " (ix.) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

The Income Tax Officer refused to allow the appellants to deduct the sum in question in the computation of the profits or gains of their business, and the Assistant Commissioner took the same view. The appellants then requested the respondent to refer to the High Court the legal question of the admissibility of the deduction. The respondent in doing so expressed, as required by the Act, his own opinion, which was also to the effect that the deduction was inadmissible. He founded his opinion on *Pondicherry Ry. Co., Ld.* v. *Commissioner of Income-tax, Madras* (1), which he submitted was on all fours with the present case, and he also referred to *Bharat Insurance Co.* v. *Commissioner of Income-tax, Lahore* (2), in which the *Pondicherry* case (1) was followed.

The questions of law as formulated by the Commissioner of Income-tax were as follows :—

(1.) Whether in the circumstances of the case and in view of the provisions of s. 4, sub-s. 1, and s. 10 of the Act, the assessee company has been correctly assessed on the total amount of Rs.5,17,288 received by it as profits and gains of the business carried on by it as the managing agents of the Tata Power Co., Ld.

(2.) Whether under the provisions of s. 10 of the Act or under any other provision thereof the assessee company is entitled to have a deduction from the said profits and gains amounting to Rs.5,17,288 to the extent of Rs.1,29,322 paid by it to certain

(1) (1931) L. R. 58 I. A. 239.

(2) (1933) L. R. 61 I. A. 41.

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parties under the agreements, exhibits F and G [being the agreements between the appellants and F. E. Dinshaw Ld. and Richard Tilden Smith's administrator respectively] on the ground that this latter amount was nothing but expenditure incurred solely for the purpose of earning the said profits or gains or on any other ground.

In the High Court the appellants were also unsuccessful. The Chief Justice (Sir John Beaumont) in his judgment held that the whole 10 per cent. commission received by the appellants from the Tata Power Co., Ld., was properly included without deduction in the assessment of the profits or gains of the appellants' business, in conformity with the decision in the case of *C. Macdonald & Co.* v. *Commissioner of Income-tax, Bombay* (1), within which the learned Chief Justice said that the present case exactly fell. He further expressed the opinion that the question whether the expenditure in question was incurred solely for the purpose of earning the profits or gains of their business was a question of fact, and that as there was no finding of fact on which the Court could hold that the deduction claimed was one falling within the statute, the question must be answered in the negative. By their order of March 27, 1935, the High Court accordingly answered the first of the questions stated by the Commissioner in the affirmative and the second in the negative.

In the case of *C. Macdonald & Co.* (1), to which the learned Chief Justice refers, the assessees carried on the business of managing agents of another company from whom they received a commission for their services. This commission the assessees were bound under an agreement to share with certain third parties, and they claimed that the shares of their commission which they paid over to these third parties should be excluded or deducted in the computation of the profits or gains of their agency business. The Court held that the case was governed by the decision in the *Pondicherry* case, (2) and that the whole commission received by the assessees must be included without deduction in the computation of their income for tax purposes.

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(1) (1934) 37 Bom. L. Rptr. 126; 7 I. T. C. 466.
(2) (1931) L. R. 58 I. A. 239.

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Before their Lordships counsel for the Crown did not seek to support the judgment of the High Court in the present case on the ground that it was ruled by the decision in the *Pondicherry* case (1), and in their Lordships' view he was well advised in recognizing the clear distinction between that case and the present case. In the *Pondicherry* case (1) the assessees were under obligation to make over a share of their profits to the French Government. Profits had first to be earned and ascertained before any sharing took place. Here the obligation of the appellants to pay a quarter of the commission which they receive from the Tata Power Co., Ld., to F. E. Dinshaw Ld. and Richard Tilden Smith's administrator is quite independent of whether the appellants make any profit or not. Indeed, if on their year's operations as a whole they were to make a loss and incur no liability to income-tax they would nevertheless have to pay away a quarter of the commission in question to the parties named. The commission in truth is not profit or gain; it is only an item or factor in the computation of the appellants' profits or gains. Their Lordships regard this as a fundamental distinction. In the case of *C. Macdonald & Co.* (2) it would rather appear that the commission which was received by the assessees and which they were bound to share with certain other parties was the sole source of income of the assessees, but, be this as it may, the decision in that case cannot be supported by the authority of the *Pondicherry* case (1) on whatever other ground it may be justified.

It was not questioned by counsel for the Crown that if the present question had arisen with Tata Sons, Ld., they would, under s. 10, sub-s. 2 (ix.), have been entitled on the facts stated to deduct their payments to F. E. Dinshaw Ld. and Richard Tilden Smith as being expenditure incurred solely for the purpose of earning their profits or gains. But he submitted that after the acquisition of the agency business by the present appellants the payments assumed a different character. The appellants, he said, did not take any part in obtaining the loans, nor did they incur the liabilities in question in the course of rendering any services to their principals. The obligation to make the payments in question was taken over by them as part of the transaction whereby they acquired the agency business from Tata Sons, Ld., and the payments were therefore made not for the purpose of earning profits in the conduct of the agency business but in fulfilment of the terms on which they purchased the business.

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(1) (1931) L. R. 58 I. A. 239.
(2) (1934) 37 Bom. L. Rptr. 126.

Their Lordships recognize, and the decided cases show, how difficult it is to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits or gains. In the present case their Lordships have reached the conclusion that the payments in question were not expenditure so incurred by the appellants. They were certainly not made in the process of earning their profits; they were not payments to creditors for goods supplied or services rendered to the appellants in their business; they did not arise out of any transactions in the conduct of their business. That they had to make those payments no doubt affected the ultimate yield in money to them from their business, but that is not the statutory criterion. They must have taken this liability into account when they agreed to take over the business. In short, the obligation to make these payments was undertaken by the appellants in consideration of their acquisition of the right and opportunity to earn profits, that is, of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business. If the purchaser of a business undertakes to the vendor as one of the terms of the purchase that he will pay a sum annually to a third party, irrespective of whether the business yields any profits or not, it would be difficult to say that the annual payments were made solely for the purpose of earning the profits of the business. It would seem to make no difference that the annual sum should be made payable out of a particular receipt of the business, irrespective of the earning of any profit from the business as a whole. The case of a transferee of a business undertaking liability, for example, for the rents under current leases of the premises in which the business was carried on by the transferor and is to be carried on by the transferee is quite a different case, for the rents paid are clearly an outlay

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necessary for the earning of profit. In the case of *Robert Addie & Sons' Collieries, Ld.* v. *Commissioners of Inland Revenue* (1), the Lord President (Clyde), dealing with corresponding words in the British Income-tax Act, says (2): "What is 'money wholly and exclusively laid out for the purposes of the trade' is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning?"

Adopting this test, their Lordships are of opinion that the deduction claimed by the appellants is inadmissible as not being expenditure incurred solely for the purpose of earning the profits or gains of the business carried on by the appellants. They thus reach the same result as the learned judges of the High Court, but on different grounds, and they would only add in conclusion that with all respect they do not share the view expressed by the learned Chief Justice that the question whether the payments in question were admissible deductions under s. 10, sub-s. 2 (ix.), was not open to argument in the High Court on the facts as found.

Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed, and the order of the High Court of March 27, 1935, be affirmed. The respondent will have his costs of the appeal.

Solicitors for appellants: *Stanley Johnson & Allen.*
Solicitor for respondent: *Solicitor, India Office.*

(1) 1924 S. C. 231.

(2) Ibid. 235.

[HOUSE OF LORDS.]

H. L. (E.)*
1937
Jan. 21.

LINCOLNSHIRE SUGAR COMPANY, LIMITED . . . . . . APPELLANTS;

AND

SMART (INSPECTOR OF TAXES) . . . RESPONDENT.

Revenue—Income Tax—Trading receipts—"Advances"—British Sugar Industry (Assistance) Act, 1931 (21 & 22 Geo. 5, c. 35), s. 1—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. D, Case I.

Advances, made under the British Sugar Industry (Assistance) Act, 1931, to a company carrying on business as manufacturers of sugar from beet grown in Great Britain:—

Held, to be trading receipts of the company and liable to income tax under Case I. of Sch. D to the Income tax Act, 1918.

Order of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal.

The Lincolnshire Sugar Co., Ld., hereinafter called the Company, were manufacturers of beet sugar in England. By the British Sugar (Subsidy) Act, 1925 (15 Geo. 5, c. 12), a subsidy was granted in respect of every hundredweight of sugar manufactured in Great Britain during a period of ten years from October 1, 1924, from beet grown in Great Britain. The Company received this subsidy in respect of the sugar which they manufactured, and treated the sums received as trading receipts.

In 1931 the British Sugar Industry (Assistance) Act, 1931, was passed. It is an Act "to provide for the making of advances to certain companies in respect of sugar manufactured by them in Great Britain during a period of one year beginning on October 1, 1931, from beet grown in Great Britain: to provide for the recovery in certain events of the whole or some part of the advances so made, and for the remission of any balance thereof not so recovered" . . . . After reciting that assistance by way of advances had been offered by His Majesty's Government to such persons as were prepared to accept the conditions therein laid down, and that certain companies including the Company had accepted the conditions, the Act provided that advances should be made out of moneys provided by Parliament to the companies specified in the First Schedule to the Act in respect of sugar manufactured by them from home-grown beet during the period of one year commencing on October 1, 1931. The maximum quantity of sugar in respect of which advances could be made was, in the case of each scheduled factory, 300,000 hundredweights, and an advance was not to be made unless the price paid or agreed to be paid to the grower of the beet represented a rate not less than the price specified in the Second Schedule of the Act.

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD ROCHE.

By s. 2 provision was made for the manner in which advances made to companies under s. 1 should be repayable. The method prescribed is that until the total amount of the advances has been repaid, the company concerned shall submit to certain deductions from the amount payable to it under the British Sugar (Subsidy) Act, 1925, if the relevant market price exceeds the basic price for that company, such deductions and prices being calculated in accordance with the complicated provisions laid down in the Third Schedule to the Act of 1931.

Between October 18, 1931, and January 3, 1932, the Company received weekly advances under the Act of 1931 in respect of sugar manufactured at its factory amounting in all to 17,494*l.* 5*s.* 7*d.*, and in its accounts for the years ending on March 31, 1932, 1933 and 1934, this sum was shown in the balance sheet as a liability. In the events which happened no part of the 17,494*l.* 5*s.* 7*d.* was repayable under the Act.

Assessments to income tax made on the Company for the year ending on April 5, 1933, included the said sum of 17,494*l.* 5*s.* 7*d.* on the basis that it was a trading receipt of the Company's year ending on March 31, 1932.

The Company appealed against this assessment and contended that the advances were not trading receipts ; or, if they were, they could not be brought into account so long as they remained subject to repayment.

The Special Commissioners upheld the Company's contention on the ground that the advances were in their nature loans and not trading receipts; and that if they were trading receipts after September 30, 1934, they were not trading receipts before that date. They stated a case on these matters for the opinion of the High Court of Justice.

The case was heard by Finlay J., who affirmed the decision of the Special Commissioners. The Inspector of Taxes appealed to the Court of Appeal. Lord Wright M.R. and Romer and Greene L.JJ. reversed the decision of Finlay J. and allowed the appeal.

The Company appealed to this House.

Raymond Needham K.C. and *R. E. Borneman* for the appellants.

Sir T. J. O'Connor S.-G. and *Reginald Hills* for the respondent.

Raymond Needham K.C. replied.

The arguments of counsel appear in the judgment of Lord Macmillan.

1937. Jan. 21. LORD ATKIN. My Lords, I have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Macmillan. I agree with it and have nothing to add.

LORD RUSSELL OF KILLOWEN. My Lords, I too have had that advantage, and I concur in the conclusions which my noble and learned friend has reached and also in the grounds upon which those conclusions are based.

LORD MACMILLAN. My Lords, I am requested by my noble and learned friend Lord Thankerton to express his concurrence in the views which I have embodied in my opinion about to be read.

My Lords, during the period to which this appeal relates the appellants, the Lincolnshire Sugar Company (now in liquidation) carried on at Bardney in Lincolnshire the business of manufacturing sugar from beet grown in Great Britain. Between October 18, 1931, and January 3, 1932, the Company received payment of sums amounting to 17,494*l.* 5*s.* 7*d.* under the British Sugar Industry (Assistance) Act, 1931, out of moneys provided by Parliament. The question for determination is whether those sums ought to be taken into account as trade receipts in computing the balance of profits and gains of the Company for the year 1931-32, on which was based the assessment of their income for tax purposes for the year 1932-33 under Case I. of Sch. D to the Income Tax Act, 1918.

By a previous statute entitled the British Sugar (Subsidy) Act, 1925, it was provided that out of moneys provided by Parliament a subsidy at prescribed rates should be paid in respect of every hundredweight of sugar or molasses manufactured during a period of ten years beginning October 1, 1924, from beet grown in Great Britain. It was made a condition of the payment of the subsidy that the price paid for the beet used in the manufacture should not be less than a minimum rate per ton prescribed by the Act. The rate of subsidy diminished by stages during the ten years period.

Under the Act of 1925 the Company duly received payment of subsidies which were carried to the credit of their profit and loss accounts as trade receipts. These subsidies were included in the computation of the Company's profits and gains for income tax purposes, and it was conceded, for the purposes of the present case, that they were rightly so included.

In the year 1931, in view of the heavy fall in the price of sugar and the diminution in the rates of subsidy, further State aid was afforded to certain of the companies (including the appellants) engaged in the British sugar beet industry which would otherwise have experienced difficulty in paying the prices contracted to be paid to the growers of the beet. This further assistance did not take the form of increasing the subsidies payable under the Act of 1925, but was provided under a statutory scheme embodied in the British Sugar Industry (Assistance) Act, 1931, whereby " advances " were to be made to the named companies in respect of sugar manufactured by them from home grown beet during the period of one year from October 1, 1931. As the question whether the payments received by the Company under the Act of 1931 were or were not trade receipts depends upon the character and incidents of these payments, it is necessary to examine the relative provisions of the Act.

The title of the Act of 1931 is in marked contrast with the title of the Act of 1925. Whereas the latter is entitled " An Act to provide for the payment of a subsidy in respect of sugar and molasses manufactured in Great Britain . . . . ," the former is entitled " An Act to provide for the making of advances to certain companies in respect of sugar manufactured by them in Great Britain during a period of one year beginning on the first day of October, nineteen hundred and thirty-one from beet grown in Great Britain ; to provide for the recovery in certain events of the whole or some part of the advances so made, and for the remission of any balance thereof not so recovered." The preamble recites that His Majesty's Government have " offered to grant assistance by way of advances to the extent and subject to the conditions mentioned in this Act to such persons engaged in the manufacture in Great Britain of sugar from beet grown in Great Britain as might be prepared to accept those conditions," and that these conditions have been accepted by the companies specified in the First Schedule to the Act (among whom are the appellants).

The first section provides for the making of the advances. They are to be paid by the Minister of Agriculture and Fisheries out of moneys provided by Parliament. The maximum quantity of sugar in respect of which advances may be made to any one factory is fixed at 300,000 hundredweights, and the amount of the advance to be made in respect of each hundredweight of sugar is to be calculated in the manner prescribed in the Third Schedule to the Act and is in no case to exceed 1*s*. 3*d*. per hundredweight. It is further provided that no advance is to be made unless the Minister is satisfied that the price paid to the grower of the beet is not less than the price per ton specified in the Second Schedule to the Act.

Having thus in s. 1 made provision for the payment of the advances, the Act proceeds in s. 2 to make provision " with respect to the manner in which and the extent to which advances made to a company under the last preceding section shall be repayable." First it is enacted in sub-s. 2 as follows :—

" (2) Until the total amount of the advances made to any company is repaid, deductions calculated in accordance with the relevant provisions of the Third Schedule to this Act shall, while the market price of imported sugar is sufficiently high to bring those provisions into operation, be made from any subsidies payable to the Company under the British Sugar (Subsidy) Act, 1925, in respect of sugar manufactured during the period of two years beginning on the first day of October, nineteen hundred and thirty-two."

Then in sub-s. 3 it is provided as follows :—

" (3) If within the period of three years commencing on the first day of October nineteen hundred and thirty-one a winding-up order is made or a resolution for a voluntary winding-up is passed with respect to the company or possession is duly taken of any of the company's property by or on behalf of the holders of any debentures secured by a floating charge or a receiver or manager of the company's business is duly appointed the total amount of the advances made to the company shall so far as not previously repaid under the last preceding sub-section become due and payable to the Minister by the company."

The section concludes by providing that " (4) Save as aforesaid, the advances shall not be repayable."

It is unnecessary to particularize the elaborate methods of calculation prescribed in the Second and Third Schedules to the Act for arriving at the minimum price of beet and for calculating advances and deductions. It is sufficient to note that the question whether any advance is to be made to a company and if so the extent of the advance is to depend on the current market price of sugar, and that no deduction under s. 2, sub-s. 2, is to be made from the subsidy payable under the Act of 1925, by way of repayment of advances, unless the market price of sugar exceeds a certain figure.

As it happens, the critical date, namely, October 1, 1934, came and went without the Company being called upon under

s. 2, sub-s. 2, to suffer any deductions from the subsidies received by them under the Act of 1925, presumably because the market price of sugar throughout the relevant period did not rise above the specified figure, or under s. 2, sub-s. 3, to make any repayment of advances, because none of the contingencies mentioned in that sub-section happened in the relevant period. The payments had thus in fact become irrevocable by the time when the matter came before the Commissioners.

My Lords, it is scarcely surprising that payments of so anomalous a character should have occasioned diversity of opinion as to the legal category to which they should properly be referred. The Commissioners came to the conclusion that they " were in their nature loans and were not trading receipts." Finlay J. did not think it necessary to use the word " loan," but dwelt on the feature that the payments " were not sums paid and paid irrevocably to the company. They were not subsidies or grants to assist the company in their business; they were sums advanced and sums which were in some contingencies at all events repayable." So he held that they were " rather in the nature of loans " and affirmed the decision of the Commissioners. The Court of Appeal took a different view. The learned Master of the Rolls (Lord Wright) was definitely of opinion that the payments " were in their inception and in their character not loans at all, but were payments made in cash out and out, subject only to the contingent liabilities which I have indicated." Both Romer L.J. and Greene L.J. were of opinion that the payments were in truth subsidies, notwithstanding the contingencies of repayment. And the Master of the Rolls and Green L.J. both emphasized the fact that before the question came to judgment the contingencies had ceased to operate and the payments had become irrevocable.

If the nature of the payments were to be determined solely by the terminology of the statute there might be much to be said for the view adopted by the Commissioners and by Finlay J., for the draftsman has done his best to persuade us that the payments were loans. He has not used that word but he calls them " advances," and he speaks of their " recovery " in whole

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or in part and of the " remission " of any balance not recovered. I agree that the word " advances " is ambiguous and may either refer to prepayments of what will become due in future or be a polite euphemism for loans ; but when " advances " are declared to be " repayable " (though only conditionally) they certainly lean to the side of loans.

But in my view the question ought not to be decided on merely verbal arguments. What to my mind is decisive is that these payments were made to the company in order that the money might be used in their business. Here I definitely part company from Finlay J. who thought that " they were not subsidies or grants to assist the company in their business." We are told in the stated case that it was because of an apprehension that the companies might not be able to pay to the growers of beet the prices they had contracted to pay that this further assistance was given by the Government. It is true that the appellants apparently did not actually require to have recourse to the " advances " they received, for in their accounts for the relevant years which have been produced the advances are not carried into profit and loss but are entered as liabilities in the balance sheet, and the profit and loss accounts show a balance of trading profit without taking the " advances " into account. But if the Company had not happened to be able to pay for its raw material otherwise it could properly have used the " advances " for this purpose. It was with the very object of enabling them to meet their trading obligations that the " advances " were made ; they were intended artificially to supplement their trading receipts so as to enable them to maintain their trading solvency. If the " advances " had in any year been carried to the credit of the Company's trading account, as might properly have been done, and the trading account had in consequence shown a profit instead of a loss, can it be doubted that the credit balance would rightly have entered into the computation of the Company's profits or gains for tax purposes ? In the year with which your Lordships are concerned, namely, the year 1931-32, " advances " were received by the Company which were intended to be used and could properly have been used to meet their current trading obligations and in

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that year the contingency of possible repayment did not in fact arise. In my opinion the "advances" ought accordingly to be taken into account in computing the balance of the Company's profits and gains for that year. If in a subsequent year down to October 1, 1934, s. 2, sub-s. 2, had come into operation (as it did not) then what would have happened would have been that the Company would in that year have received proportionately less subsidy, resulting in a corresponding diminution of assessable income under this head. That is to say, the "advances" would have proved in the event to have been in effect prepayments of subsidy and so deductible from future subsidy. The contingency of repayment in the events mentioned in s. 2, sub-s. 3, does present a more difficult feature of the case, but I do not think that it called for an estimate of that contingency being made in the year 1931-32 and debited as a contingent liability.

It may be a question whether it is legitimate to have regard to the fact that it is now known that the payments are irrevocable and that the contingency of repayment can now never arise. The question might have had to be decided before this was known. There are observations by noble and learned Lords in *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* v. *Pontypridd Waterworks Co.* (1), to the effect that a Court ought not to shut its eyes to the true facts if they subsequently know them although these facts could not have been known when the question originally arose, and ought not to resort to guessing when certainty is available. I have sympathy with this view and with what the Master of the Rolls and Greene L.J. have to say on the point. But I do not find it necessary to rest my judgment on wisdom after the event. I prefer to rest it on my view of the business nature of the sums in question which the Company received in 1931-32. I think that they were supplementary trade receipts bestowed upon the Company by the Government and proper to be taken into computation in arriving at the balance of the Company's profits and gains for the year in which they were received.

(1) [1903] A. C. 426.

I am accordingly in favour of dismissing the appeal with costs.

LORD ROCHE. My Lords, I concur.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, Jan. 21, 1937.

Solicitors for appellants : *Romer, Skan & Brashier.*
Solicitor for respondent : *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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Nov. 13.
1937
March 15.

JOHN KENNEDY CARRUTH ON BEHALF OF HIMSELF AND ALL OTHER THE DEFERRED SHAREHOLDERS OF AND IN IMPERIAL CHEMICAL INDUSTRIES, LIMITED . . . } APPELLANT;

AND

IMPERIAL CHEMICAL INDUSTRIES, LIMITED . . . . } RESPONDENTS.

Company—Reduction of capital—Confirmation by the Court—Ultra vires—Deferred shareholders—Variation and extinguishment of rights—Memorandum of Association—Separate class meeting—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 55.

A company was incorporated under the Companies Acts, 1908 to 1917, for the purpose of acquiring shares and other interests in various other companies. At the material date the capital of the Company consisted of 95,000,000*l.* divided into 22,727,000 preference shares of 1*l.* each, 43,767,355 ordinary shares of 1*l.*, 21,745,290 deferred shares of 10*s.* each, 15,133,000 unclassified shares of 1*l.* each and 5,000,000 unclassified shares of 10*s.* each. By one of the articles of association the profits of the Company were to be applied towards payment to the holders of cumulative preference shares of a dividend of 7 per cent.; secondly, towards payment to the ordinary shareholders of a non-cumulative dividend of 7 per cent., and the balance towards payment of a further dividend on the ordinary shares and a dividend on the deferred shares, the dividend paid on the ordinary shares to be as nearly as possible twice that paid on the deferred shares.

By clause 6 of its memorandum of association the Company was empowered to increase its share capital and to issue shares of the original or new capital with any preference or priority over any other shares and to vary the regulations of the Company as far as necessary to give effect to any such preference or priority " but so that unless provided by the terms of issue of any shares any preferential or other special rights for the time being annexed to any special class of shares shall not be affected or abrogated without the sanction of a separate meeting of the holders of shares of the class held pursuant to the Articles registered herewith."

By Art. 36 the board of directors was authorized, with the sanction of the Court previously given, in a general meeting to convert any paid up shares into stock. By Art. 44 the Company might by special resolution reduce its capital by paying off capital, cancelling capital which had been lost or was unrepresented by available assets, reducing the liability on the shares " or otherwise as " might " seem expedient," or it might " by ordinary resolution cancel shares not taken or agreed to be taken by any person."

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* *Present:* LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, and LORD MAUGHAM.

By Art. 71 the holders of any class of shares might by an extraordinary resolution passed at a meeting consent on behalf of all the holders of shares of that class to the issue of shares ranking equally therewith, or having priority thereto, or to the abandonment of any preference or priority, or to the amalgamation into any one class of the shares of any two or more classes, or to any scheme for the reduction of the Company's capital and generally consent to any alteration, transaction or arrangement which persons holding all the shares of that class could consent to. By Art. 72 any meeting for the purpose of Art. 71 was to be convened and concluded in the same way as nearly as possible as an extraordinary meeting of the Company. At any such meeting, immediately upon a declaration of the result of the show of hands, a poll might be demanded in writing by the chairman. At the date of the meetings mentioned below there were 63,000 persons holding both ordinary and deferred shares, 65,000 holding ordinary shares only, and 17,000 holding deferred shares only.

In the year 1935 the board of directors came to the conclusion that in the best interests of the Company the capital, namely 95,000,000*l*. divided as above stated, should be reduced to 89,565,859*l*. divided into 22,727,000 preference shares of 1*l*. each, 43,767,355 ordinary shares of 1*l*. each, 21,736,564 deferred shares of 5*s*. each, 8726 deferred shares of 10*s*. each, 15,133,000 unclassified shares of 1*l*. each, and 5,000,000 unclassified shares of 10*s*. each, and that this reduction should be effected by cancelling paid up capital to the extent of 5*s*. a share on each of 21,736,564 deferred shares which had been issued and by reducing the nominal amount of each of such last mentioned deferred shares from 10*s*. to 5*s*. Secondly, that provided this reduction of capital should be confirmed by the Court, certain unissued deferred shares of 10*s*. each should be consolidated into half their number of 1*l*. shares and made part of the Company's unclassified shares; and that certain unclassified shares of 10*s*. each should be consolidated into half their number of unclassified shares of 1*l*. each. Thirdly, that the rights and privileges attached to the said 43,767,355 1*l*. ordinary shares and to the 21,736,564 5*s*. deferred shares should be varied by amalgamating the said ordinary and deferred shares into one class of ordinary shares; and Fourthly that the capital of the Company should be increased to its former amount of 95,000,000*l*. by the creation of 5,434,141 additional unclassified shares of 1*l*. each.

A circular notice containing these proposals was sent to the shareholders together with (1.) a notice of an ordinary general meeting of the Company to be held at a certain place on May 1, 1935, at 10.30 A.M., and three other notices of other meetings

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to be held at the same place on the same day, namely (2.) a notice of an extraordinary general meeting of the Company for the purpose of passing, among other resolutions, a resolution for reduction of the capital; (3.) a notice of a separate meeting of the ordinary shareholders; (4.) a notice of a separate meeting of deferred shareholders; the three last mentioned meetings to be held respectively at 10.45 A.M., 11.0 A.M., and 11.15 A.M. or as soon thereafter as the meeting immediately preceding should be concluded, with the object of passing as an extraordinary resolution under No. 71 of the articles of association a resolution consenting to the reduction and reorganization of the Company's capital as above stated.

At the ordinary general meeting on May 1, 1935, 1600 shareholders were present of whom 565 were holders of deferred shares. Notice convening the extraordinary general meeting was taken as read. The chairman stated that the meeting would be followed by a meeting of the ordinary shareholders, and then by a meeting of deferred shareholders; that he proposed to make one speech and to take the vote at the two meetings to follow without any further speeches. He then explained to the general meeting the proposals of the board and their reasons for submitting those proposals and then moved the special resolutions which had been set out in the notice convening the meeting. These were put to the vote and defeated on a show of hands, whereupon the chairman demanded a poll, after which he adjourned the meeting to a later hour when the result of the poll would be declared.

The class meeting of the ordinary shareholders followed. The chairman moved as an extraordinary resolution the proposals set out in the notice convening the meeting. This was carried by the requisite majority, but the chairman gave notice demanding a poll and directed that it should be taken forthwith, and adjourned the meeting to a later hour when the result of the poll would be declared.

The class meeting of the deferred shareholders followed, and the same course was pursued. On a show of hands the resolution was declared to have been negatived. The chairman demanded a poll to be taken forthwith, and adjourned the meeting to a later hour when the result of the poll would be declared.

The extraordinary general meeting and the class meetings of the ordinary and deferred shareholders were resumed at the hour named. The chairman then announced the result of the polls and declared that the resolutions had been duly carried as special resolutions and as extraordinary resolutions respectively.

The reduction of capital effected by the special resolution passed at the extraordinary general meeting having been confirmed by an order of the Court of Appeal affirming an order of the Chancery Division made upon a petition by the Company:—

Held, (1.) that the meetings were duly summoned;

(2.) that the reduction of capital was not ultra vires;

(3.) (Per Lord Blanesburgh) that, although, if the question had been open, the meeting of the deferred shareholders was not a separate meeting, the resolution must for the purposes of the petition be taken to have been duly passed, as it had not been challenged by the appropriate procedure.

(Per Lord Russell of Killowen and Lord Maugham) that, although prima facie a separate meeting of a class should be a meeting attended only by members of the class, the meeting of deferred shareholders having been properly convened, the presence of shareholders of another class was a matter relating to the conduct of the meeting, which lay in the hands of the chairman with the assent of those persons who were properly present and constituted the meeting, and, as no objection was taken at the meeting, those present must be taken to have assented to the meeting being so conducted, and the resolution was accordingly valid ;

(4.) That the scheme was fair to both classes of shareholders ;

(Per Lord Blanesburgh) that as the resolution for reduction of capital was not in accord with the legal rights of the holders of the deferred shares, it could only be supported on the ground that it had been proved on the evidence to be fair to all classes of shareholders.

(Per Lord Russell of Killowen) that in view of the large number of votes in favour of the scheme given at the meeting of deferred shareholders by persons who also held ordinary shares the Court should itself decide the question of fairness or unfairness on the evidence before it.

(Per Lord Maugham) that, without throwing any doubt on the general proposition that shareholders acting honestly are usually better judges of what is to their commercial advantage than the Court, where it is proved that the majority of a class may have voted in the way they did because of their interests as shareholders in another class, little attention should be paid to the vote of the majority in considering whether the scheme is fair.

The fairness or unfairness of a scheme involving a reduction of the capital of a company is not a matter for the discretion of the judge in a technical sense, but is a matter to be decided on the evidence, the question being whether, on the evidence before the Court, the probable future of the company will entail unfair treatment of one class of shareholders for the benefit of another.

Observations by Lord Blanesburgh upon the method of demanding a poll under s. 117 of the Companies Act, 1929.

Order of the Court of Appeal [1936] Ch. 587 affirmed.

Appeal from an order of the Court of Appeal (1) affirming an order of Eve J. in the Chancery Division made upon a petition by Imperial Chemical Industries, Ld. (hereinafter called " the Company"), praying for confirmation of a reduction of the capital of the Company under s. 55 of the Companies Act, 1929.

(1) [1936] Ch. 587.

The circumstances giving rise to the questions in dispute and the manner in which the case was dealt with in the Courts below were stated in the judgment of Lord Maugham, as follows :—

The Company was incorporated on December 7, 1926, under the Companies Acts, 1908 to 1917, for the purpose of acquiring and holding the whole or any portion of the shares, debentures, debenture stock and other interests of and in Brunner Mond & Co., Ld., Nobel Industries, Ld., United Alkali Company, Ld., and British Dyestuffs Corporation, Ld., and any other companies engaged concerned or interested in any of certain trades or businesses which the Company was formed to carry on and to promote the beneficial co-operation thereof, to carry on business as manufacturers of and dealers in chemicals of all kinds, dyes, dyestuffs, paints, varnishes, drugs and other pharmaceutical and toilet preparations, and other objects set forth in the memorandum of association thereof.

The initial nominal share capital of the Company was 65,000,000*l.*, divided into 47,320,000 shares of 1*l.* each and 35,360,000 shares of 10*s.* each. Clause 6 of the memorandum of association of the Company provides (inter alia) that the Company may issue any shares of the original or new capital with any preference or priority in the payment of dividends or the distribution of assets or otherwise over any other shares, whether deferred ordinary or preference and whether issued or not, but so that unless otherwise provided by the terms of issue of any shares any preferential or other special rights for the time being annexed to any special class of shares shall not be affected or abrogated without the sanction of a separate meeting of the holders of shares of the class held pursuant to the articles registered with the said memorandum of association.

Art. 113 of the articles of association of the Company provides as follows :—

" Subject to the rights of the holders of any shares other than the ordinary and deferred shares and the original preference shares that may be issued upon special conditions, the profits of the Company which the Company shall in accordance with Art. 114 determine to distribute by way of dividend in respect of each financial year of the Company shall be applied as follows :—

FIRSTLY—To or towards the payment to the holders of the cumulative preference shares of a cumulative preferential dividend at the rate of *7l.* per centum per annum on the amount for the time being paid up or credited as paid up on the preference shares, and

SECONDLY—To or towards the payment to the holders of the ordinary shares of a non-cumulative dividend for the year at the rate of 7 per cent. per annum on the amount paid up or credited as paid up thereon.

The balance of profits remaining available for distribution shall be distributed as follows :—

(A) A further dividend on the amount paid up or credited as paid up on the ordinary shares together with

(B) A dividend on the amount paid up or credited as paid up on the deferred shares

in such a manner that the total amount of such balance to be so distributed in respect of the ordinary shares shall be as nearly as possible twice the total amount to be distributed in respect of the deferred shares, the dividend in the case of each class being calculated to the nearest one-quarter per cent. and fractions ignored."

Art. 4 of the Company's articles of association provides as follows :—

" In the event of the winding-up of the Company, the assets of the Company available for distribution shall be applied, first in paying to the holders of the cumulative preference shares the amounts paid on such shares together with a sum equivalent to any arrears of dividends, whether declared or undeclared, down to the commencement of the winding-up, and interest at the rate of 7 per cent. per annum from the commencement of the winding-up to the date of payment ; secondly, in paying to the holders of the ordinary shares the amounts paid on such shares ; thirdly, in paying to the holders of the deferred shares the amounts paid on such shares. Any surplus remaining shall be distributed amongst the holders of the ordinary and deferred shares in the ratio of two-thirds to the holders of the ordinary shares and one-third to the holders of the deferred shares upon the amounts paid up on their shares respectively."

Arts. 62 and 66 of the Company's articles of association provide as follows :—

" 62. Subject to any special terms as to voting upon which any shares may be issued, or may for the time being be held, every member shall upon a show of hands have one vote and upon a poll one vote in respect of each ten preference shares one vote in respect of each ordinary [share] and one vote in respect of each two deferred shares held by him."

" 66. No member shall be entitled to vote at any meeting held after the expiration of three months from the registration of the Company (other than the statutory meeting or any adjournment thereof) in respect of any share that he has acquired by transfer unless he has been registered as the holder of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote."

The Company's articles of association contain the following provisions as to increase, consolidation and reduction of capital and conversion of shares into stock :

" 36. The Board may, with the sanction of the Company previously given in general meeting, convert any paid-up shares into stock, and may also, with such sanction as aforesaid, re-convert such stock into paid-up shares of any denomination."

" 40. The Company may in general meeting consolidate its shares, or any of them, into shares of a larger amount."

" 42. The board may, with the sanction of a general meeting of the Company, from time to time increase the capital of the Company by the issue of new shares."

" 44. The Company may by special resolution reduce its capital by paying off capital, cancelling capital which has been lost or is unrepresented by available assets, reducing the liability on the shares, or otherwise, as may seem expedient, or it may by ordinary resolution cancel shares not taken or agreed to be taken by any person. Capital may be paid off upon the footing that it may be called up again or otherwise."

Arts. 71 and 72 of the Company's articles of association are important and provide as follows :—

" 71. The holders of any class of shares may at any time and from time to time, and whether before or during liquidation, by an extraordinary resolution passed at a meeting of such holders, consent on behalf of all the holders of shares of the class to the issue or creation of any shares ranking equally therewith, or having any priority thereto, or to the abandonment of any preference or priority, or of any accrued dividend or dividends, or the reduction for any time or permanently of the dividends payable thereon, or to the amalgamation into one class of the shares of any two or more classes, or to the subdivision of shares of one class into shares of different classes, or any alterations in these articles varying or taking away any rights or privileges attached to shares of the class, or to any scheme for the reduction of the Company's capital affecting the class of shares in a manner not otherwise authorized by these articles, or to any scheme for the distribution (though not in accordance with legal rights) of assets in money or in kind in or before liquidation, or to any contract for the sale of the whole or any part of the Company's property or business determining the way in which as between the several classes of shareholders the purchase consideration shall be distributed, and generally consent to any alteration, contract, compromise, transaction or arrangement which the persons voting thereon could if sui juris and holding all the shares of the class consent to or enter into, and such resolution shall be binding upon all the holders of shares of the class.

72. Any meeting for the purpose of the last preceding clause shall be convened and conducted in all respects as nearly as possible in the same way as an extraordinary general meeting of the Company ; provided that no member, not being a director, shall be entitled to notice thereof or to attend thereat, unless he be a holder of shares of the class intended to be affected by the resolution, and that no vote shall be given except in respect of a share of that class, and that the

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quorum at any such meeting shall (subject to the provision as to an adjourned meeting hereinbefore contained) be members or corporation representatives holding or representing by proxy one-tenth of the issued shares of that class, and that at any such meeting immediately upon a declaration of the result of the show of hands a poll may be demanded in writing by the chairman or by any five members or corporation representatives holding one-tenth of the issued shares of that class present in person or by proxy and entitled to vote at the meeting."

Shortly after the incorporation of the Company the chairman of the four merging companies, with the approval of the board of the Company, sent to their respective shareholders an invitation to exchange their shares of various classes in the merging companies for fully paid shares of various classes in the Company, and this exchange was duly carried out. The Company then commenced to carry on business and it has traded with great success. On May 31, 1928, the capital of the Company was increased to 75,000,000*l.* by the creation of 20,000,000 new shares of 10*s.* each, and on April 18, 1929, the capital was further increased to 95,000,000*l.* by the creation of 40,000,000 new shares of 10*s.* each.

During the year 1928 the Company made an issue of 3,363,855 ordinary shares of 1*l.* each at 33*s.* per share and 2,242,570 deferred shares of 10*s.* each at par, and during the year 1929 the Company made an issue of 4,410,597 7 per cent. preference shares of 1*l.* each at 23*s.* per share and 6,016,857 ordinary shares of 1*l.* each at 33*s.* 6*d.* per share, and certain additional shares of all classes have from time to time been issued by the Company. At the date on which the meetings to approve the proposed capital reduction and reorganization referred to below were convened the capital of the Company was as follows:—

Description.	Authorized Capital.	Issued Capital.	Unissued Capital.
7 per cent. Cumulative Preference Shares of 1*l.* each	22,727,000*l.*	22,723,229*l.*	3,771*l.*

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Description.	Authorized Capital.	Issued Capital.	Unissued Capital.
Ordinary Shares of 1*l.* each	43,767,355*l.*	43,756,659*l.*	10,696*l.*
Deferred Shares of 10*s.* each	10,872,645*l.*	10,868,282*l.* (21,736,564 shares)	4,363*l.* (8726 shares)
Unclassified Shares of 1*l.* each	15,133,000*l.*	—	15,133,000*l.*
Unclassified Shares of 10*s.* each	2,500,000*l.*	—	2,500,000*l.* (5,000,000 shares)
	95,000,000*l.*	77,348,170*l.*	17,651,830*l.*

The number of shareholders of the Company of all classes has at all material times been in excess of 180,000. At the date of the relevant meetings there were over 63,000 shareholders who held both ordinary and deferred shares compared with 65,000 shareholders holding ordinary shares only and 17,000 shareholders holding deferred shares only.

After a careful and prolonged consideration of the position the board of directors in the month of April, 1935, proposed terms of reorganization of the Company's capital in which a reduction of the capital from 95,000,000*l.* to 89,565,859*l.* was an integral part. Each 2*l.* of deferred share capital was to be converted into 1*l.* of ordinary share capital, the capital, as a whole (apart from the preference share capital which was not affected by the scheme) being unified into one class of ordinary share capital. One-half of the deferred share capital amounting in round figures to five and a half million pounds (more exactly, 5,434,141*l.*) was thus to be taken away from the holders of the deferred shares, and was to be dealt with by a reduction of capital which required the confirmation of the Court under s. 55 of the Companies Act, 1929. It is the confirmation of this reduction which is the subject involved in the present appeal.

On April 6, 1935, the secretary of the Company sent to the shareholders a circular explaining in detail the board's proposals. In the same envelope the secretary enclosed the following documents or notices, namely :—

(A) The annual report of the Company for the year 1934 with which was incorporated the financial statistical record of the Company set out in tabular form year by year from the date of its incorporation.

(B) The notice convening the eighth ordinary general meeting of the Company to be held at the Central Hall, Westminster, London, S.W.1, on May 1, 1935, at 10.30 A.M. and an extraordinary general meeting of the Company to be held at the same place on the same date at 10.45 A.M. or so soon thereafter as the business of the ordinary general meeting has been concluded.

The notice convening the ordinary and extraordinary general meetings set out the ordinary business to be transacted at the ordinary general meeting and that as special business it was proposed to consider and if thought fit pass the following resolution as a special resolution :—

" That on the 30th day of June, 1936, or, if before that date the reduction and reorganization of capital proposed to be effected by the resolutions appended to the notice of an extraordinary general meeting, to be held at the close of this meeting, shall have become effective, then on the date on which the same shall become effective, all the shares in the capital of the Company of each class, then issued and outstanding and fully paid up, be converted into stock of the same class, and that all shares of any class subsequently issued shall, as and when the same shall have been fully paid up, become and be converted into stock of that class."

The said notice further set out that at the extraordinary general meeting it was proposed to consider and if thought fit pass the following resolutions as special resolutions :—

" 1. That the capital of the Company be reduced from 95,000,000*l.* divided into 22,727,000 preference shares of 1*l.* each, 43,767,355 ordinary shares of 1*l.* each, 21,745,290 deferred shares of 10*s.* each, 15,133,000 unclassified shares of 1*l.* each and 5,000,000 unclassified shares of 10*s.* each to 89,565,859*l.* divided into 22,727,000 preference shares of 1*l.* each, 43,767,355 ordinary shares of 1*l.* each, 21,736,564 deferred shares of 5*s.* each, 8726 deferred shares of 10*s.* each, 15,133,000 unclassified shares of 1*l.* each and 5,000,000 unclassified shares of 10*s.* each and that such reduction be effected by cancelling paid up capital to the extent of 5*s.* per share on each of the 21,736,564 deferred shares which have been issued and are fully paid up and by reducing the nominal amount of each of such issued deferred shares from 10*s.* to 5*s.*

2. That upon the said reduction of capital being confirmed by the Court and becoming operative :—

(1.) The 8726 deferred shares of 10*s.* each, at present unissued, shall be consolidated into 4363 shares of 1*l.* each and such 1*l.* shares shall be regarded as forming part of the Company's unclassified shares.

(2.) The 5,000,000 unclassified shares of 10*s.* each shall be consolidated into 2,500,000 unclassified shares of 1*l.* each.

(3.) The existing rights and privileges attached to the said 43,767,355 ordinary shares of 1*l.* each and to the 21,736,564 deferred shares of 5*s.* each resulting from the said reduction shall be varied by the amalgamation (as from and after the close of the year 1934) of the said ordinary shares and the said reduced deferred shares into one class of ordinary shares and by the extinguishment of all special rights or privileges attached to the shares of those respective classes so that the said ordinary shares and the said deferred shares shall as from January 1, 1935, become and be and be regarded as forming one class of ordinary shares ranking pari passu for purposes of dividend and return of capital and entitling the holders thereof on a poll to one vote for every 1*l.* in nominal value of such shares held by them respectively and that all such shares be thenceforth termed ordinary shares.

(4.) The capital of the Company shall be increased to its former amount of 95,000,000*l.* by the creation of 5,434,141 additional unclassified shares of 1*l.* each.

3. That if by reason of the aforesaid reduction of capital and the conversion of fully paid shares into stock any members of the Company become entitled to holdings of ordinary stock which are not an exact multiple of 1*l.* the

Directors be authorized and empowered to sell so much of the said respective holdings as shall be required to reduce them to an exact multiple of 1*l.* for the best price they can reasonably obtain and to divide the net proceeds of sale amongst the persons entitled to the amounts of stock so sold in their due proportions, with power to nominate some person to transfer any stock so sold to the purchaser thereof and to register the purchaser as the holder thereof."

Further special resolutions approving consequential alterations in the Company's articles of association to become operative on the Court confirming the reduction and reorganization of capital involved in the special resolutions set out above were also included in the body of the said notice but are not material for the purposes of the questions arising on this appeal.

(c) Notice convening a separate meeting of the holders of the ordinary shares to be held at the Central Hall, Westminster, on May 1, 1935, at 11.0 A.M. or so soon thereafter as the extraordinary general meeting convened for the same day and place had been concluded for the purpose of considering and if thought fit passing with or without modification the following resolution as an extraordinary resolution binding on all the holders of ordinary shares pursuant to clause 71 of the respondent Company's articles of association, namely :—

" That this meeting of the holders of the ordinary shares in the capital of the Company hereby consents on behalf of all such holders to the arrangements for the reduction and reorganization of the capital of the Company (including the amalgamation of the ordinary and reduced deferred shares into one uniform class of ordinary shares) which are embodied in the series of resolutions appended to the notice dated the 6th day of April, 1935, convening an extraordinary general meeting of the Company held on this date, a print of which resolutions is signed by the Chairman for the purposes of identification, and sanctions the variation of the rights and privileges attached to the ordinary shares in the capital of the Company and the arrangements and transactions which are expressed to be effected or authorized by the said resolutions or are involved therein, to the intent that on such resolutions respectively taking effect they may be valid and effectual and may be binding on all the holders of the said ordinary shares."

(D) Notice convening a separate meeting of the holders of the deferred shares to be held at the Central Hall, Westminster, on May 1, 1935, at 11.15 A.M. or so soon thereafter as the meeting of the ordinary shareholders convened for the same day and place had been concluded for the purpose of considering and if thought fit passing with or without modification as an extraordinary resolution a resolution similar in terms (mutatis mutandis) to the resolution last above set out.

All shareholders received combined admission and voting cards and forms of proxy enabling them to record their votes by proxy or to attend the meetings convened for May 1, 1935, and to record their votes personally at the meetings at which they were entitled to vote.

In view of the fact that shareholders might hold only one class of shares or more than one class of shares in various combinations, four separate types of admission and voting cards and forms of proxy were adopted but each shareholder only received one of such cards according to the category in which he fell :—

(i.) In cases where a shareholder held only preference shares he received a proxy form for use at the extraordinary general meeting only, with a blue form of voting card for use at that meeting.

(ii.) In cases where a shareholder held preference and ordinary shares or ordinary shares only he received proxy forms for use at the extraordinary general meeting and the class meeting of the ordinary shareholders, with a blue form of voting card for use at the extraordinary general meeting and a pink form of voting card for use at the class meeting of the ordinary shareholders.

(iii.) In cases where a shareholder held preference and deferred shares or deferred shares only he received proxy forms for use at the extraordinary general meeting and the class meeting of the deferred shareholders, together with a blue form of voting card for use at the extraordinary general meeting and a green form of voting card for use at the class meeting of the deferred shareholders.

(iv.) In cases where a shareholder held preference, ordinary and deferred shares, or ordinary and deferred shares only, he received proxy forms for use at the extraordinary general meeting and at the respective class meetings of the ordinary and deferred shareholders, together with a blue form of voting card for use at the extraordinary general meeting, a pink form of voting card for use at the class meeting of the ordinary shareholders and a green form of voting card for use at the class meeting of the deferred shareholders.

The course of the proceedings at the various meetings held on May 1, 1935, was as follows :—

At the ordinary general meeting there were about 1600 shareholders of all classes personally present at the time when the proceedings opened at 10.30 A.M. by the secretary reading the notice convening the meeting. The chairman delivered a speech containing a comprehensive review of the Company's activities during the past financial year, a print of which was handed to all shareholders on their entering the Hall. The usual resolutions approving the accounts, re-electing directors and appointing auditors, together with the special resolution relating to the conversion of the issued and fully paid shares into stock were duly passed on a show of hands. Shareholders who desired to ask any questions were asked by the chairman to come to the rostrum immediately under the board table so that every one could hear their questions. Certain questions were thereupon asked by shareholders and answered by the chairman. One shareholder who attempted to criticize the proposed capital reorganization was informed by the chairman that that was a matter for the next meeting.

At the extraordinary general meeting which followed, the proceedings were started by the chairman delivering a further speech to the shareholders which related solely to the capital reorganization proposals, a print of such speech having been handed to all shareholders on their entering the Hall. The chairman prefaced his speech by stating that, in view of the notice convening the extraordinary general meeting having been sent to all shareholders, he would with their permission take it as read. Nobody present objected to this proposal. Quite early in his speech the chairman stated :—

" The extraordinary general meeting of all the shareholders will be followed by two class meetings, namely, first a class meeting of the ordinary shareholders, and, second, a class meeting of the deferred shareholders. At the class meetings, these two classes of shareholders will be asked in turn to vote upon an extraordinary resolution approving of the proposed reorganization and reduction of the Company's share capital in so far as those proposals amount to a variation of the rights and privileges attached to the ordinary shares and to the deferred shares respectively.

" I propose, with your approval, to make one speech in relation to these three meetings, and, therefore, to take the vote at the two subsequent class meetings of the ordinary shareholders and the deferred shareholders, respectively, without any further speeches."

No objection was taken to the chairman's proposal.

The chairman in his speech elaborated the points made by the board's circular of April 6, 1935, and explained in detail the reasons which had led the board to lay their proposals before the shareholders and he stated that, in the view of the board, they were advantageous to the Company as a whole and in the interests of all classes of shareholders. The chairman also dealt with certain criticisms of the scheme which had been received by the board in the interval which had elapsed between the despatch of the board's circular and notices and the date of the meetings, and stated that Sir William McLintock and Sir Albert Wyon, principal partners in the Company's two firms of auditors, were both satisfied that the proposals were fair and reasonable and in the interests of the Company. The chairman concluded by moving the special resolutions set out in the notice convening the meeting and asked that, as it was a very lengthy document, it might be taken as read. Nobody objected to this course.

The shareholders were given an opportunity before the resolutions were put formally to the vote of coming to the rostrum and of asking questions. Twenty shareholders in turn came up to the rostrum and expressed their views on the board's proposals. The great majority of the speeches were made by holders of deferred shares, who were either averse to any proposal to consolidate the ordinary and deferred shares into one class or suggested that the ratio of conversion was unfair towards the deferred shareholders, but there was also a speech by a shareholder who criticized the proposals from the point of view of the ordinary shareholders.

After all shareholders who desired to address the meeting had spoken, the chairman put the resolutions to the vote. The resolutions having been defeated on a show of hands the chairman, purporting to act in pursuance of the power vested in him under the Company's articles of association, demanded a poll and directed that it should be taken forthwith. The chairman referred those present to the voting cards on the back of their tickets of admission and directed them to sign the portion coloured blue and to specify whether they were for or against the resolutions. The chairman, having said that the voting cards would be collected at the door at the conclusion of the class meeting of the deferred shareholders, declared the meeting adjourned until 5.30 P.M., when the result of the poll would be announced.

The class meeting of the holders of ordinary shares followed. The chairman stated that he had already covered the business of this meeting in his speech at the preceding extraordinary general meeting and that he did not propose to make another speech. Nobody objected to this procedure. He moved as an extraordinary resolution the resolution set out in the notice convening the meeting and this was seconded. Nobody present having shown any inclination to raise any further questions or to address the meeting, the chairman then put the resolution to the meeting, pointing out that only those shareholders present whose voting cards had a pink portion could vote. The resolution was put to the meeting and was declared to be carried by the necessary majority as an extraordinary resolution, but the chairman gave written notice, in pursuance of Art. 72 of the articles, demanding a poll and directed that it should be taken forthwith. The chairman, having said that the voting cards would be collected at the door at the conclusion of the class meeting of the deferred shareholders, declared the meeting adjourned until 5.30 P.M., when the result of the poll would be announced.

The class meeting of the holders of deferred shares followed and the same course was taken. The chairman, after pointing out that only shareholders present whose voting cards had a green portion could vote, then put the resolution to those shareholders. The resolution was declared to have been lost on a show of hands and the chairman thereupon, in accordance with his rights under Art. 72, demanded a poll and directed that this should be taken forthwith. The chairman indicated that those shareholders present who were entitled to vote were to sign the green portion of their admission and voting cards in the appropriate way. He then declared the meeting adjourned until 5.30 P.M., when the result of the poll would be announced, and stated that that concluded all the business to be transacted pending the announcement of the polls, and he invited the shareholders to return for this purpose at 5.30 P.M. In concluding, the chairman requested the shareholders on leaving to hand their admission and voting cards to the Company's officials at the doors in order that all votes either for or against might be accounted for.

It is admitted that holders of shares of other classes than deferred shares were in the Hall during the class meeting of the deferred shareholders, but no shareholders (other than deferred shareholders) took any part in the conduct of the class meeting of the deferred shareholders. The deferred shareholders present at this class meeting were free to confer together or ventilate their views or address the meeting, but the matter having been discussed at some length at the preceding extraordinary general meeting (mainly by deferred shareholders present at that meeting) none of them showed any desire to do so.

As Eve J. observed in his judgment the proceedings were conducted in such a manner as to satisfy those present, and no objection was taken by any of the shareholders present at either of the class meetings to the physical presence in the Hall during the conduct of such meeting of holders of shares of a class other than that affected. An affidavit was indeed filed on behalf of the opponents of the scheme, in which the deponent (Mr. Sidney Lee) stated that, as a holder of 100 deferred shares, he was present at the meetings, and that immediately prior to the chairman commencing the section of the proceedings which dealt with the deferred shareholders' proposed resolutions, he rose and asked the chairman to request all ordinary and preference shareholders to leave the Hall, so that only deferred shareholders would remain for the consideration of the deferred shareholders' proposed resolutions, and that the chairman took no notice whatever of his request and went on with the proceedings. There is no record in the shorthand transcript of the proceedings at the various meetings of any such statement having been made by Mr. Lee, and his observations were in fact not heard by the chairman. His request seems not to have been supported by any other deferred shareholders, and in my opinion this inaudible protest must be disregarded in considering the validity of the meetings.

The extraordinary general meeting and the class meetings of the ordinary and deferred shareholders were resumed at 5.30 P.M. on the same day when about 100 shareholders attended to hear the results of the polls, and at such adjourned meetings the chairman announced the result of the polling and declared that the resolutions laid before the extraordinary general meeting had been duly carried as special resolutions and that those before the respective class meetings of the holders of ordinary and deferred shares had been duly carried as extraordinary resolutions.

Subsequently to the announcement of the result of the polls, the board of the Company subjected the figures to a detailed re-check and scrutiny and it was found that owing to the haste with which the calculations had been made there were certain errors in the figures originally announced which did not however affect the results. The revised figures of the polling at the three meetings in question were as follows :—

	For.		Against.	
	Votes.	%	Votes.	%
Extraordinary general meeting	22,803,402	91·44	2,135,971	8·56
Class meetings—				
Ordinary shareholders	18,663,383	94·26	1,136,163	5·74
Deferred shareholders	3,722,414	77·26	1,095,688	22·74

On May 2, 1935, the Company presented its petition to the Chancery Division of the High Court of Justice praying for confirmation of the capital reduction involved in the special resolutions passed at the extraordinary general meeting.

On May 21, 1935, Mr. Registrar Stiebel made an order dispensing with an inquiry as to the creditors of the Company and directing that the petition should be placed in the list for hearing before Eve J. on June 24, 1935.

The petition came on for hearing before Eve J. on the 25th, 26th and 30th of July and the 5th, 6th, 8th and 13th of November, 1935, when numerous affidavits which had been filed in support of and in opposition to the scheme were read, and many of the deponents were cross-examined at considerable length. On November 13, 1935, Eve J. stated that he proposed to state at once the conclusion at which he had arrived and to leave to some later period the delivery of his judgment. He stated that he was satisfied that it was the duty of the Court in this case to confirm the resolutions which had been passed and that he did so and approved of the minute which had been proposed. The opponents asked for their costs of appearing on the petition, but Eve J. stated that he saw no particular reason why he should not leave those who had opposed the scheme to pay the costs which they had incurred in so doing and he accordingly made no order as to their costs.

On December 20, 1935, Eve J. delivered his reserved judgment, in which he gave his reasons for confirming the reduction of capital. In the course of his judgment he pointed out that the proposed reduction of 5,434,141*l*. arose not because any capital had been lost or was unrepresented by available assets or because it was proposed to repay paid up capital to the shareholders, but because it was proposed to reduce the nominal value of the deferred shares from 10*s*. to

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5*s.* each as an integral part of a scheme for the simplification of the Company's capital account by readjusting the respective rights of the ordinary and deferred shareholders and amalgamating these two classes of shares into one class. He observed that the main question on which the shareholders were divided was how many deferred shares were to be given in exchange for one ordinary share. The opinion of those deferred shareholders who supported the opinion that the exchange ought to have been on a more liberal basis than 4 to 1 was founded to a large extent on the assertion that the Company had been gradually accumulating large reserves of undisclosed and undistributed profits. After indicating that the evidence filed on the petition disposed absolutely of any suggestion that there existed undisclosed reserve funds, he summed up the contention of the opposing shareholders on the fairness of the scheme by saying that, whilst opinions might well differ as to the relative value of the ordinary and deferred shares, this was a point which was more likely to be solved satisfactorily by the shareholders than the Court, and that the shareholders, including the deferred shareholders, having by very substantial majorities decided that the bargain was acceptable, it was quite impossible for him in the face of such majorities to say that it ought not to be accepted.

With regard to the board's circular explaining the scheme, Eve J. said that in his opinion the circular was so composed as to convey to the recipients not only all the information necessary to enable them to realize what the proposals of the board were, but also the grounds on which the policy underlying the proposals was based, and that no one had come forward to say that he did not understand the circular or was misled thereby. Eve J. said that he did not accept the view that it was incumbent on the directors in their circular to disclose their respective holdings of ordinary and deferred shares and that no want of good faith, coercion or overreaching on the part of the Company, its directors, or other agents, had been suggested. With regard to the proceedings at the meetings, Eve J. said that at each of them the proceedings were conducted so as to satisfy those present. It was not suggested that anybody voted in the wrong class; indeed he thought that the contrary was proved; and it was impossible in the circumstances to hold that the bodily presence in the room where the meetings were held of persons who belonged to other classes invalidated the meeting.

On December 3, 1935, the Company was served with a notice of appeal, which purported to be given on behalf of John Kennedy Carruth and a large number of other members of the Company holding deferred shares.

The appeal was heard by the Court of Appeal, consisting of the Master of the Rolls (Lord Wright), Romer L.J. and Clauson J., on the 9th, 10th, 11th and 12th of March, 1936. At the conclusion of the arguments for the appellants the Court intimated that they did not desire to hear counsel for the respondents. The Master of the Rolls then announced the decision of the Court, dismissing the appeal with costs.

The reasoned judgment of the Court of Appeal was delivered by Clauson J. on April 1, 1936.

J. K. Carruth appealed to this House.

1936. Nov. 4. *H. J. Wallington K.C.*, *B. B. Stenham* and *Sir Hugh Lucas Tooth* for the appellants. The reduction of the capital of the respondent Company was ultra vires the Company. Its power to reduce its capital is defined by s. 55 of the Companies Act, 1929 (1), and by No. 44 of its articles of association. By Art. 44 it may reduce its capital by paying off capital, cancelling capital which has been lost or is unrepresented by available assets, reducing the liability on shares, " or otherwise "; but no capital is to be paid off,

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(1) Companies Act, 1929, s. 55, sub-s. 1: " Subject to confirmation by the Court, a company limited by shares or a company limited by guarantee and having a share capital may, if so authorized by its articles, by special resolution reduce its share capital in any way, and in particular, without prejudice to the generality of the foregoing power, may—

(*a*) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

(*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up available assets; or

(*c*) either with or without extinguishing or reducing liability on any of its shares pay off any paid-up share capital no capital has been lost and no liability is to be reduced, and the words "or otherwise" must be construed ejusdem generis with the methods of reduction expressly mentioned in the article. There has therefore been no reduction of capital within the meaning of Art. 44, and consequently none within s. 55 of the Companies Act, 1929.

Secondly, if there was power to reduce capital under s. 55, there was no power to affect or abrogate the special rights of the deferred shareholders without a separate meeting of those shareholders as required by clause 6 of the memorandum of association and clause 71 of the articles. In the proceedings which took place on May 1, 1935, there was never any actual physical separation of the deferred shareholders. After the so-called class meeting of the ordinary shareholders, which was held in the presence of those who had attended the extraordinary general meeting, the chairman proceeded at once with the class meeting of the deferred shareholders in the presence of all the other shareholders of the Company who chose to remain after their separate meetings had been adjourned. The only separation consisted in furnishing the members of each class with voting cards of distinguishing colours and a direction that members of each class were to use the card appropriate to that class, and no other. This probably did constitute a separate poll, but a separate poll and a separate meeting are not the same thing. The deferred shareholders, whose rights were being affected and to a certain extent abrogated, must have been hampered and hindered from free discussion of their position by the presence among them of persons having other and opposing interests. In short there was never any separate meeting of the deferred shareholders, and the reduction of capital and subsidiary resolutions of the Company ought never to have been sanctioned.

Nov. 10. *Gavin Simonds K.C.*, *Lionel Cohen K.C.*, and

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which is in excess of the wants of the company,
and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly." . . . .

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Cecil Turner for the respondents. There is no suggestion of mala fides in this case. The circular notice stated all the information necessary to enable the shareholders to appreciate the details of the proposed scheme and its effect upon the deferred shareholders.

The class meetings of the ordinary and deferred shareholders held on May 1 were proper separate meetings within the meaning of clause 6 of the Company's memorandum of association and proper class meetings within the meaning of No. 71 of the articles of association. There is nothing in the articles to preclude the presence at a class meeting of persons not members of that class. There is no evidence that the deferred shareholders attending the separate meeting were in any way affected by the presence of holders of ordinary or any other shares.

Moreover the scheme was designed, and its effect was, to improve the position of the deferred shareholders. This could only be done provided that the ordinary shareholders were not unfairly or inequitably affected. The ratio of conversion adopted by the Board was in fact fair and equitable to both classes.

The Court's power of confirming a reduction of capital is a discretionary power. Eve J. and the Court of Appeal having both approved of the scheme, this House will be slow to reverse the conclusions of both Courts, which moreover it is submitted were right and ought to be affirmed.

Nov. 12. *Wallington K.C.* replied.

Nov. 13. Their Lordships considered that the order appealed from should be affirmed, and the appeal dismissed without costs for reasons to be given at a later date.

1937. March 15. LORD BLANESBURGH. My Lords, at the close of the arguments in this case I had, like the rest of your Lordships, reached the conclusion, albeit possibly by a somewhat lonely road, that the order of Eve J. confirming the reduction of the respondent Company's capital must stand, and that this appeal from the order of the Court of Appeal, affirming that of the learned judge, should be dismissed, although in the circumstances without costs.

For the respondent Company, with its 180,000 shareholders and world-wide commitments, it was obviously of first importance that there should be no further suspense as to the result of its reduction petition now that finality had at long last been reached. Of hardly less importance, on the other hand, was it, that the reasons, which had led your Lordships in effect to accede to the prayer of that petition, should be carefully formulated and individually stated in a case of such magnitude, of such moment to the parties immediately concerned, and of such general interest to those engaged in company administration. It was accordingly decided by your Lordships that, while the formal order of the House dismissing the appeal should at once be made, the reasons therefor should be stated on some later occasion. So the order was promulgated forthwith, and the House is now met that the reasons which led your Lordships individually to advise it may be given.

I have had, my Lords, the advantage of reading in print the opinion which my noble and learned friend Lord Maugham has prepared and I am glad to be permitted by him to base all that now follows upon the detailed account he gives of the complicated facts and circumstances concerning this Company, its constitution, its scheme of capital reorganization, and the meetings of shareholders convened to consider that scheme, all brought under review on the appeal. It will, as a result, be unnecessary for me to travel over that ground again, and any additions I may be tempted to make to my noble friend's narrative will be introduced for no other purpose than to accentuate my own point of view.

And first may I say a word about the appeal, and the position of the appellant with reference to it.

It is an appeal by a single deferred shareholder in the Company seeking to have the approval of the House withheld from a reduction of the Company's paid up deferred share capital. The appellant did not, however, really stand alone. He voiced the opposition to the scheme of many other deferred shareholders although not strictly representing them at the hearing. But notwithstanding this support, the appellant must have realized that very heavy upon him was the burden of the appeal. Agreeing with the utmost frankness that the scheme of reduction which he contested had been promulgated in perfect good faith, he was faced by the fact that, to say nothing of its having been apparently approved by the prescribed majorities of shareholders, it had on this petition been confirmed successively by Eve J. and by the Court of Appeal. Nor was the burden lightened when it was recalled that by the time the appeal reached this House for hearing more than eighteen months had elapsed since the reduction resolution had been passed, and that during that interval the multitude of ordinary and deferred shareholders in the Company had been encouraged by the approval of successive Courts to act in relation to their shares as if the scheme had gone through. Mr. Gavin Simonds, indeed, on behalf of the Company, influenced, I do not doubt, by such considerations as these, strongly contended that an order confirming a reduction resolution, being a discretionary order, would not, although technically open to appeal, be reviewed either by the Court of Appeal or by this House unless it were made plain that the learned judge of first instance, confirming the reduction, had seriously misdirected himself either in fact or in law. There were, as will be seen later, questions of law raised by this appeal which deprive this objection of much of its relevance. But while I hesitate to subscribe in general terms to a view so broadly stated, I would say at once that, had the appeal raised no issue beyond those dealt with and disposed of concurrently and in the exercise of their discretion by the learned judge and the Court of Appeal, I would have been slow to advise the House to intervene, whatever might have been my own view of this reduction had I been considering it in a Court of first instance. But, as I saw it, that was not the case here. The course of proceedings in this House had left to your Lordships for solution a different and a more difficult problem than any presented either to Eve J. or to the

Court of Appeal, a problem upon which neither Court had been called upon to pronounce. Difficulties affecting the reduction, substantial some of them, had not before been ventilated as they were here, while the most far-reaching criticism of all, a criticism which called in question the justification for the reduction being laid upon the deferred shares exclusively, was in effective form introduced by one of your Lordships during the argument in this House, and was then only and for the first time duly considered.

And, my Lords, on full reflection, I came to be of the opinion that that criticism was well founded; that the assumption ultimately made on all sides, that under the Company's constitution this particular reduction fell first and exclusively upon the deferred shares, was mistaken: and that, in the circumstances, it lay upon the petitioners, in the absence of a class consent, not as I thought forthcoming, to establish affirmatively that the reduction in its present form was fair and equitable to the deferred shareholders. It was only because I was judicially so satisfied that I was ready to concur and did concur in the order of the House which in effect confirmed the reduction. It may well be possible to reach the same conclusion by other and easier ways. But, for me, so soon as I was satisfied that the incidence of the reduction should not under the articles have fallen primarily upon the deferred shares, there was to its confirmation no other road open than that by which I have travelled if jettison was not to be made of certain principles in relation to class resolutions which I hold to be of first importance.

Before proceeding to the general discussion of these matters I would dispose of a contention of the appellant's which stood apart and is conveniently considered separately. The reduction, the appellant urged, was ultra vires the Company as being unauthorized by its articles of association. Based, as the reduction was, upon the principle of *Poole* v. *National Bank of China* (1) the appellant could not successfully contend that it was not authorized by statute. He maintained, however, that it was a reduction beyond the purview of Art. 44. No capital, he pointed out, was being paid off; none which had been lost or was unrepresented by available assets was being cancelled; no liability on shares was being reduced. What genus, he asked, could be named wide enough to embrace within it each of these specified methods and at the same time include this present form of reduction under the words "or otherwise" of the article? The answer was not I thought difficult, if one had to be found. This reduction, with those specified, shared the characteristic that each was authorized by statute. And that, I thought, was enough. Clauson J. in the Court of Appeal states the position in simple terms. The Company took power by Art. 44, he says, to reduce its capital in any way in which it was under the statute authorized so to do. I entirely agreed with the learned judge in that view. This contention, therefore, as it seemed to me, failed.

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(1) [1907] A. C. 229.

Let me now say a word about this scheme of capital reorganization of which the reduction of capital was an essential part. It was a scheme promulgated by the directors in the general interests of the Company, as was on all hands recognized, and in circumstances and for purposes fully described by Clauson J. in his judgment. In embryo the scheme had its beginning in the memorandum of Dr. Coates of January 25, 1933. In its details it necessarily became elaborate and complicated; but, described in terms of its purpose and result, it was in origin, and it remained throughout its course, a scheme of marked simplicity notable mainly for its magnitude. As a result of it, there were to be no longer in issue any deferred shares in the Company; the holders of the issued deferred shares were to become holders of ordinary shares representing one-half in nominal value of their previous holding in deferred shares. In other words, they were to find themselves possessed of one fully paid ordinary share of 1*l.* for every four of their fully paid deferred shares of 10*s.* each. This involved a reduction or cancellation in some form of 5*s.* paid up on every issued deferred share, an aggregate reduction of 5,434,141*l.* of paid up deferred capital. But none of that capital had been lost. It remained intact. The Company had been and was highly prosperous. No longer credited to the deferred shareholders, by whom in meal or in malt the capital had been provided, it had to be credited somewhere else, and by the scheme it was transferred to the credit of a capital reserve account created on terms which, so long as certain new regulations remained unaltered, ensured that it would not be returned as dividend to any shareholder. To this provision, which, as I thought, had received far less attention than it deserved, I will return later.

Now the great problem in relation to the scheme had been to equate in terms of value a deferred and an ordinary share in this Company, two things which with their widely divergent rights, explained by my noble and learned friend, were, in that respect, almost incommensurable. The proportion of four to one finally adopted in the scheme was an adjustment based, not upon any valuation of the respective rights attached to the shares, but upon a comparison of the market prices of each over a period of years, modified or corrected in result by the special knowledge of the directors, including Dr. Coates, whose opinion at the date of his memorandum and throughout, I think, was that a proportion of four to one, if unfavourable in any direction, was so to the ordinary shares rather than to the deferred. He shared the opinion held, it would seem, by the governing directors, that the market price of the deferred, relatively to that of the ordinary shares had been, as a rule too indulgent to the deferred : some adjustment in this respect was not therefore out of place, and some adjustment in this direction, albeit very slight, was made and reflected in the final proportion.

From the date of its promulgation, the substantial opposition to the scheme came from deferred shareholders, although the ordinary shareholders were not unanimous in its favour. By deferred shareholders it was excepted to on many grounds : that, for instance, it was ill-timed and premature, propounded before the permanent relation was in sight in which following a long period of depression the deferred shares were to stand to the ordinary. Ultimately however the real contest with the appellant and his associates became one as to the fairness to the deferred shares of this proportion of four to one so reached. A proportion of two to one would have been welcomed by the appellant's party; a proportion of three to one might have been accepted, albeit reluctantly; the proportion of four to one could not, it was asserted, be justified, and it had not been as the result of the elaborate evidence adduced from both sides.

On the other hand a proportion of five to one was the claim of a few ordinary shareholders—a claim not without some impartial support from Dr. Coates. These conflicting demands had been composed in advance by the adoption of the four to one proportion, a proportion to be made effective, as has been seen, by the reduction of 5*s*., or 50 per cent., of the nominal value of every deferred share. And at this point it is perhaps helpful to emphasize the essential inter-connection under a scheme in this form between the amount of the reduction of the deferred shares and the number of ordinary shares under the scheme to be received by the deferred shareholder in exchange. If one ordinary share for every five deferred was to be received the reduction must have been 6*s*. on every deferred share; if the proportion were fixed at four to one, the reduction, as we have seen, was 5*s*.; if three to one, the reduction must have been 3*s*. 4*d*. only; if two-and-a-half to one, or five to two, the reduction would have been no more than 2*s*. per share; and if two to one had been made the fixed proportion (the ideal of the deferred shareholder), then there needed to be, and there would have been, no reduction at all and no application to the Court would have been called for. In other words, the reduction where it was necessary had to be such that the reduced deferred shares could, in accordance with the pre-arranged proportion, be amalgamated with the ordinary shares pound for pound, It is perhaps well to bear this essential inter-connection in mind, because the only judicial confirmation asked for by the Company's petition was a confirmation of the reduction necessarily involved in its scheme. No confirmation of the scheme as a whole was either appropriate or craved. Any objection therefore taken by the appellant to the order appealed from had, if it was to have effect, to be a valid

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objection to the reduction, as such. Unless this limitation were borne in mind there was a real risk, I felt, that error might supervene in disposing of the appeal for the reason that the principles applied by the Court when dealing with reduction petitions are in many respects individual and special—particularly, if the reduction in question be one which is not in accordance with what I may call the " law " of the articles, like the present reduction, as I will presently essay to show. This is not to say of course that the fairness or otherwise of the proportion fixed by the scheme was not open to discussion on the petition. It was completely so open, but strictly perhaps in the form of an objection to the extent of the reduction one way or the other. For, as the number of new ordinary shares to be received in respect of reduced deferred shares was dependent on the extent of the reduction, its amount was as vital to an old ordinary as it was to a deferred shareholder, although from quite opposite points of view. From that of the opposing ordinary shareholder the reduction to be fair should have been greater, while any less reduction than that proposed would be a further injury to his class. To the opposing deferred shareholder, on the other hand, the proposed reduction was already unfair ; any greater reduction would be to him a further injury. In other words the acceptance of the reduction in point of amount meant to a critical ordinary shareholder an acceptance of an amount which he had claimed should be greater, and to the deferred shareholder it meant the submission to an amount which he had claimed should be less. It was right therefore—even if not under the articles necessary—that both classes and in identical terms should have been separately asked to approve the reduction in point of amount. And this they were in effect asked to do and, at all events, did, if they did no more, by the extraordinary resolutions to which my noble friend has referred.

Now it was almost as a matter of course that the burden of the reduction was thrown upon the deferred shares exclusively. Having regard to relative values it was essential, if the scheme was to work at all, that ultimately any necessary reduction should fall upon them. But if these shares were not under the articles liable to bear the entire burden, its necessary imposition upon them by any scheme would naturally be, as regarded amount, a question of terms to be negotiated between the two classes of shares. But no such negotiation in this case took place, for the reason, as I opine, that on the question of the proper incidence of the reduction, there was not supposed to be anything to negotiate about. The Company's view as to the position of the deferred shares had apparently become clear. It was assumed, naturally enough perhaps, although, I now believe, erroneously, that so soon as the proportions had been fixed, and with them the consequential reduction amount, the burden of the reduction as a matter of law no less than as a matter of business fell without more upon the deferred shares and on them alone. It was, I thought, plain that in the view of the Company the first, indeed the only thing that really mattered was the proportion in which the ordinary and deferred shares were to be taken and given. And the fairness or otherwise of that proportion—fraud of any kind being out of the question—was a matter for the shareholders in their different classes to decide and for no one else. Up to this point no approval of the Court was required, and everything after the point had been passed was mere machinery to give the amalgamation in that fixed proportion full effect. The alterations of the articles; the extraordinary resolutions at separate meetings; the necessary reduction of 50 per cent. of paid up deferred capital—these were all of them mere incidents in the procedure by which the deferred shares of the Company were to become amalgamated with its ordinary shares in the predetermined proportion. The only difference between the reduction and these other incidents was that its final effectiveness was dependent upon its being confirmed by the Court. The reduction was, however, merely the "last step," the "final step," of a scheme already approved in principle—it was so regarded by the Company and it was so described by Clauson J. who accepted, as will be seen, without discussion the view that the reduction "lawfully" fell upon the deferred shares exclusively.

That this was the view of the directors became, I thought, clear by two governing pronouncements of theirs; the first, the chairman's speech commending the scheme to the shareholders at the extraordinary general meeting of the Company held on May 1, 1935, and the second, the directors' circular of April 6, 1935. Referring to criticisms of the scheme which had been received from shareholders, the chairman in the course of his speech at the meeting said (Record p. 229): "Some shareholders appear to regard the reduction of capital as a central point of the board's proposals and suggest that, if it is necessary, sacrifice should be made equally by all classes of shareholders and not borne by the deferred shareholders alone. In our case this reduction of the issued capital of the Company is not the central point of the board's proposals, for it does not arise because of any loss of shareholders' money, or because the Company is not prosperous, but as a consequence of the scheme providing for the substituted shares ranking pari passu with the existing ordinary shares whereas at present the deferred shares rank after the ordinary shares."

There is no ambiguity in these words. They describe the scheme and its result in its business sense. A deferred shareholder is, under it, receiving in ordinary shares of the company shares equal in value to his deferred shares unreduced: from his point of view, therefore, the reduction of his deferred shares so far from being a central point is merely one of the steps necessary to secure for him in exchange for his old deferred shares his reduced proportion of new ordinary shares, reduced because these were higher in ranking than his old shares—the pith and marrow of the scheme.

And in the same sense, although less direct, are the references to the reduction contained in the directors' circular. There are, I think, only two of these and as they are brief, I will quote them.

"REDUCTION OF THE COMPANY'S SHARE CAPITAL.

"The board's proposals involve a reduction of the Company's share capital to the extent of one-half of the present nominal amount of the issued deferred shares, i.e., 5,434,141*l.*, and it will therefore be necessary to obtain the confirmation of the High Court, before the proposals, if carried by the shareholders, can become operative."

* * * * * *

"PROCEDURE INVOLVED IN CARRYING THE ABOVE PROPOSALS INTO EFFECT.

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"2. A class meeting of the ordinary shareholders at which they will be asked to pass an extraordinary resolution approving of the proposed reorganization and reduction of the Company's share capital in so far as these proposals amount to a variation of the rights and privileges attached to the ordinary shares.

"3. A class meeting of the deferred shareholders at which they will be asked to pass a similar extraordinary resolution approving of the proposed reorganization and reduction of the Company's share capital in so far as these proposals amount to a variation of the rights and privileges attached to the deferred shares."

The arresting thing about these statements is that the two class meetings are described in terms identical; one does not find there any suggestion even remote that the reduction was other than a reduction in the normal course or that, in relation to its legality, there was any difference at all between the deferred and the ordinary shares to the disadvantage of the deferred.

But, if any doubt remained on this point it was dispelled by the course of the proceedings on the reduction petition both before Eve J. and the Court of Appeal. The assumption of the petition being that the incidence of the reduction rightly fell upon the deferred shares, where it was placed by the special resolution, the opposing deferred shareholders apparently, after suggesting the contrary view, did not persist in their criticism. And in the result the Company's assumption as to its proper incidence was accepted by the learned judge, and it became the basis of his order on the petition, and later the basis also of the order of the Court of Appeal. "Nor was it ever seriously argued," Eve J. says in his judgment, "that the burden of the proposed reduction was not rightfully imposed on the shares standing last on the rota for dividend distribution." And to that question, so settled, he does not again recur, and it was not revived in the Court of Appeal. So, too, the explanation of the duty of the Court in considering whether or not it should confirm a proposed reduction of capital there given by Clauson J. (Record p. 129) is clearly an explanation of its duty when the reduction in question is what for brevity I would now venture to term a regular reduction. And it was, I think, clearly the learned judge's assumption that this was one. On that footing there was no suggestion, nor necessity for the suggestion, that the reduction had become regular only as a result of the extraordinary resolution passed at the so-called separate meeting of the deferred shareholders to which further reference will presently be made.

The effect of Eve J.'s definite finding that the reduction was regular apart from any such extraordinary resolution is made plain in his judgment. Having stated that the shareholders were themselves the best judges of the fairness of the scheme of which they had approved by the necessary majorities, the learned judge proceeds: " As soon as the Court is satisfied that the resolution has been accepted by the Company and by those who are affected by it, and there is no suggestion of any misrepresentation or misconduct on the part of the Company, the petitioners are entitled to the order."

Was then the assumption justified on which the orders both of Eve J. and the Court of Appeal were based? Was this reduction in law or in the result a regular reduction? If it was not, how far is the petition of the Company to have it confirmed thereby prejudiced? If again it was not, can the Company now claim the benefit of that last statement of Eve J.? As I saw them these were the questions which demanded an answer, and to them no judicial attention had, so far, been directed.

And, my Lords, although the answer to the question whether this reduction was regular does not lie upon the surface, and although it is not surprising that the question was never seriously raised until its possibility was suggested by one of your Lordships, still, as already indicated, it became, I thought, clear that no other than a negative answer to it was possible. The position was this. While, as has been seen, there is contained in clause 44 of this Company's articles a detailed power to reduce capital, there is not to be found in that or in any other article direct provision as to the incidence of any reduction thereby authorized. All that in this connection can be gathered from Art. 44 itself is that the proper incidence of every reduction there specified cannot be the same, so varied are the results of the different forms of reduction mentioned: again, Art. 71 makes it clear that there may be a reduction of the Company's capital which will affect a class of shares in a way not authorized by the articles. And if the articles are examined for answer to the question whether this was such a reduction, it will be found that except in the case where the reduction is proposed because capital has been lost or is unrepresented by available assets, no justification is therein even by implication disclosed for throwing any reduction exclusively upon the deferred shares. The implication that in that one case it may be so thrown, arises, not perhaps, as Eve J. seems to have thought, from Art. 113, but from Art. 4 which, in a winding-up, provides for the return of their capital, first to the preference shares, next to the ordinary, and lastly to the deferred shares: and as no surplus assets are available for return to the deferred shareholders until the prior claims of the holders of the preference shares and of the ordinary shares in respect of the amounts paid up thereon have been met in full, it may properly be implied—it is perhaps a matter of necessary implication in the absence of any provision elsewhere to the contrary—that when capital is lost and in consequence reduced while the Company is a going concern, the reduction should follow the same order. But in no other case is there room for any such implication, and here there has been no loss of capital. And, as to the proper incidence of such a reduction, no hint escapes from the articles. Nor is that surprising. This reduction, as has been said, is based on the authority of *Poole* v. *National Bank of China*. (1) But there is,

(1) [1907] A. C. 229.

your Lordships were told, no reported case in which that authority has since been invoked, and the difficulties involved in its application are well understood. They were dwelt upon by Lord Wrenbury in each edition of his work subsequently edited by himself. It is not surprising therefore that the articles here contain no provision, either express or implied, whereby the incidence of a reduction in character well-nigh unique is even indicated. Which class of shares in this Company, it may be asked, is to be charged with a reduction so exotic that it merely cancels capital credited to a share in which its holder is solely interested in order that the same capital may be transferred to a credit in which he is only fractionally concerned? That is the question, and the reduction having been held to be authorized by the Act, the answer must be found in the application to the problem of appropriate general principle—and that principle must, I apprehend, be that in this Company the reduction should be suffered rateably by all three classes of shares therein, following strangely enough the suggestion of his correspondents referred to by the chairman in his speech. The truth is that a reduction of paid up capital, when no loss has been sustained, is in this Company a reduction against the incidence of which no share is protected by any other. From the brunt of such a reduction there is no escape, even for the preference shares. In this respect their position as against all shares is not to be distinguished from the position of the ordinary shares as against the deferred.

Here then was a difficulty interposed which, in my judgment, had to be displaced in some way before it would have been proper to confirm the reduction. As the result of the mistaken assumption no heed had been paid to the question whether the reduction thrown exclusively on the deferred shares was as a separate incident in accord or not with the proper burden of these shares in contrast with the other shares in the Company. As the result of the same assumption no reference to this question was made nor had it to be made in the directors' circular to the shareholders. More important still, the reduction properly regarded became not a formal last step in the scheme, but an essential first step, a step which, except as part of a scheme which was, shall we say, not unfavourable to their class, was not perhaps likely to be taken by or expected from a three-fourths majority of deferred shareholders fully conscious of their key position and their rights in this respect. Finally—to take one concrete instance—as the result of the same assumption, no attention had been given to the question whether, if the legal position of the deferred shares was being overborne—as on the present hypothesis it had to be if any scheme of amalgamation was in this Company to work—the particular sacrifice called for from them of their 5,434,141*l.* transferred to capital reserve might not properly have been diminished so as to carry with it as a necessary consequence some proportion of ordinary shares more favourable to them than one of 4 to 1.

The result of all this, if it were right, was, as I saw it, that in hoc statu, this reduction could not be confirmed unless (*a*) it could be shown that the reduction had been made regular as a result of the extraordinary resolution passed at the meeting of the deferred shareholders on May 1, 1935, or unless (*b*) on the principle of *British and American Trustee and Finance Corporation* v. *Couper* (1) the Company had affirmatively established that the reduction, although not in accord with the legal rights of the deferred shares, was nevertheless, in the return received by these shares under the scheme, fair and equitable to their holders.

Mr. Gavin Simonds for the Company did not accept, but he did not seriously dispute, the proposition that the reduction pure and simple was not in accord with the legal rights of the deferred shareholders under the articles. But he suggested that this was one entire scheme and that the reduction, although for statutory reasons it had to be segregated from the other provisions of the scheme and be brought separately before the Court for confirmation, ought nevertheless to be judged by the result to the deferred shareholders of the whole scheme. His main contention however—and he urged it with great force and insistence—was that the reduction had become

(1) [1894] A. C. 399.

quite regular by the extraordinary resolution of the deferred shareholders consenting to it. That resolution had, under the articles, made the reduction a matter of contract between all the shareholders, and had the same effect as if the articles had contained a clause that this particular reduction should fall exclusively upon the deferred shares. The appeal must be dealt with on that footing. Such was his contention.

In order to test its soundness the terms of the extraordinary resolution propounded for the consideration of the deferred shareholders must now be examined. Once again, as in the directors' circular in relation to the two class meetings the resolution, mutatis mutandis, is in terms identical with that propounded to and passed by the class meeting of ordinary shareholders, and set forth in my noble friend's judgment. The deferred resolution—I state it for convenience of reference—is, so far as presently relevant, as follows :—

" That this meeting of the holders of the deferred shares in the capital of the Company hereby consent on behalf of all such holders to the arrangement for the reduction and reorganization of the capital of the Company (including the amalgamation of the ordinary and reduced deferred shares into one uniform class of ordinary shares) . . . . and sanction the variation of the rights and privileges attached to the deferred shares in the capital of the Company and the arrangements and transactions which are expressed to be effected or authorized by the said resolutions or are involved therein to the intent that on such resolutions respectively taking effect they may be valid and effectual and may be binding on all the holders of the deferred shares."

The appropriate consent there given is, it will be seen, a consent " to the arrangement for the reduction . . . . of the capital of the Company " and nothing more.

Now had that resolution been intended by the directors when they propounded it to record, and had it on its true construction actually represented, a consent by the deferred shareholders to a reduction of their shares which in the language of Art. 71 was " not otherwise authorized by the

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articles," I would have agreed with Mr. Simonds that, when passed in accordance with the provisions of that article, the resolution would have had the effect attributed to it by him. But, my Lords, while I express the conclusion with real diffidence, because I know that it may not be reached by either of your Lordships, I feel so satisfied that the resolution did not have, and could not have been intended to have that effect, that I feel it to be my duty to give expression to that conviction if merely for the sake of the principle which underlies it—namely, that only by the clearest words and in full knowledge of their rights will a class be held bound by a resolution which it is suggested modifies or extinguishes these rights. I need only refer to the *Quebrada Railway, Land and Copper Co.* (1) for an example of the strictness with which the Court in relation to reduction rights applies this principle.

These considerations are apt in relation to that resolution. If, as I have sought to show, the only reduction then being propounded was, in respect of its incidence, one which was entirely regular, I again for brevity's sake use that word, then no consent of the deferred shareholders by extraordinary resolution was required to make it so. And such a consent was not a thing to be asked for without good reason. A request for it might well have determined the fate of the whole resolution, as suggesting, rightly or wrongly, a differential treatment of the deferred shares. It could not, of course, with any sense have been asked for from the ordinary shareholders. It would certainly, confined to the deferred shareholders only, have made it impossible for the class resolutions of the ordinary and deferred shareholders to be identical in terms—a distinct addition to the attractions of the scheme. But that the directors were not, in their belief, asking any consent from the deferred shareholders to a reduction of their shares not otherwise authorized by the articles is, to my mind, clear in the light of the facts and circumstances already detailed disclosing their then attitude to this reduction. Any idea that the reduction, once it was fixed in amount, was otherwise than completely normal in every aspect of it was negatived by these facts and circumstances, that is to say, by the statements regarding it contained in the board's circular, by the explanation of the incidence of the reduction given in the chairman's speech, by the foundation on which the reduction petition was based, and by the Company's attitude on this subject before Eve J. leading him to the conclusion as to the proper incidence of the reduction which I have quoted from his judgment. As a result, I found it impossible to read this resolution as a conscious invitation to the deferred shareholders to consent to this reduction as any other than a regular reduction unless I was prepared at the same time to deny to the chairman's speech and to the directors' circular —I say nothing more of the Company's attitude on the petition—those qualities of candour, frankness and impartiality which by common consent are the outstanding characteristics of both. And that, my Lords, I could not do.

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(1) (1888) 40 Ch. D. 363.

But what, apart from any question of intention, is the true construction of the words of the resolution on this subject of reduction? For this purpose the resolution must be read in connection with the special resolution which, it was assumed, would first have been passed by the shareholders in general meeting: and next, in connection with Art. 71 from which the extraordinary resolution derives its power and effect. When associated with the special resolution it is seen that "the rights and privileges" referred to in the extraordinary resolution have particular if not exclusive reference to the "rights and privileges" specified in s. 3, sub-s. 2, of the special resolution, and these are not concerned with the incidence of any reduction. And when reference is made to Art. 71, that article provides, it will be seen, for the consent being given by extraordinary resolution at a class meeting (inter alia) (1.) "to the amalgamation into one class of the shares of any two or more classes"; and (2.) "to any scheme for the reduction of the Company's capital affecting the class of shares in a manner not otherwise authorized by these articles." Now if these two provisions are transferred to the text of the extraordinary resolution, it is found that without any compelling necessity and clearly for certainty only the words with reference to amalgamation are textually reproduced in the resolution: but from it in relation to reduction any reference to the final emphatic words of the article is with equal significance altogether omitted. Upon this, my Lords, treating the matter as one of construction only, the suggestion must be that those emphatic words of Art. 71, although not expressed, are to be implied in the extraordinary resolution; that is to say there are to be deemed inserted there after the words "capital of the Company" some such words as these: "notwithstanding in regard to the reduction that it affects this class of deferred shares in a manner not otherwise authorized by the Company's articles of association and including," etc.

Now (passing by for the moment the possibility of implying any such words in this resolution), I presume that if capable of being implied there, the words by parity of reasoning are capable mutatis mutandis of being implied also in the ordinary shareholders' resolution. But such further implication is in that resolution demonstrably inadmissible. For, so far as the ordinary shares are concerned, the incidence of this reduction—one suffered by the deferred shares alone—touches them no more than it touches the preference shares: and with regard to these not only was no consent asked for but it was stated in the directors' circular, and quite correctly, that the rights of the preference shares were entirely unaffected by the board's proposals. And if, as touching the deferred shareholders' resolution, the question be now considered on what I may call its merits, equally inadmissible, although for a different reason, is the suggestion that any such words should be implied therein; for such an implication would at once run counter to the published official statements with reference to the reduction and to the other matters already detailed, all of them completely inconsistent with the suggested implication which thereby becomes impossible. In other words, the implication of the words in the ordinary shareholders' resolution would introduce absurdity, and, in the deferred shareholders', contradiction.

But, my Lords, perhaps a sufficient reason against resorting here to implications for purposes of construction is that the meaning of both extraordinary resolutions on this subject of reduction is sufficiently clear without making any implications at all. What, let it be asked, is the aspect of this reduction—a necessary part of a larger scheme—which, while common to both ordinary and deferred shares, leaves the preference shares quite unaffected? And the answer is, as I have already explained, its amount. The effect on this subject of the two resolutions, when duly passed, was in my judgment this—that in amount the shareholders both ordinary and deferred became consenting parties to a reduction of 5,434,141*l.*, no more and no less, and on this head they consented to nothing else. In particular no consent from the deferred shareholders to the incidence of this reduction being laid exclusively upon their shares, notwithstanding that such incidence was not otherwise authorized by the Articles, was either asked for or given; and for the reason that, by a mistaken assumption, no such consent was considered to be necessary.

In the result therefore, notwithstanding Mr. Simonds' argument to the contrary, it was not, in my judgment, possible to regard the reduction as having been regularized by the extraordinary resolution of the deferred shareholders. It follows in my view, as matters then stood, that no confirmation of that reduction could be given unless the Court—and now this House—was able to avow itself on the evidence judicially satisfied that this reduction, not in accordance with the Company's articles, was nevertheless in effect fair and equitable to the deferred shareholders: *Couper's* case. (1)

And here was a very different problem from that with which either Eve J. or the Court of Appeal had to deal. The right of the Company to an order confirming the reduction enunciated by the learned judge applied to what he conceived

(1) [1894] A. C. 399.

to be a regular reduction ; it was not applicable to one no longer regular, the vital distinction being, that whereas the learned judge and the Court of Appeal were dealing with a reduction which was described as being a last step—almost a formal step—in an elaborate scheme, your Lordships were now called upon to deal with a reduction which I have termed a first and essential step in the scheme—a step which the deferred shareholders would not by any Court be forced to take except upon terms affirmatively shown to be fair and just to themselves. Can the terms in this instance properly be so described ? That was the question.

My Lords, I very anxiously considered it. It was not an easy question to answer. Had it arisen before Eve J. very shortly after the passing of the reduction resolution the safest answer, adopting in principle the *Quebrada Co.* (1), would have followed a further separate meeting of the deferred shareholders duly summoned to consider a resolution couched in unambiguous language. But for the House to direct such a meeting to be convened after an interval of over eighteen months would not have been just to the other interests in the Company, and would have been an indulgence to the appellant's party to which they were in no way entitled, seeing that the new aspect of the case which called for such a meeting, if ever it had been seen by them clearly, had been ignored after the first hearing of the petition. And no application that a second meeting of deferred shareholders should be directed was made by the respondent Company. The Company was naturally content that the question with the appellant should be settled on existing materials. The question therefore had to be answered judicially on these materials only. And the answer can be briefly stated.

My Lords, it had been, I thought, quite clearly demonstrated that the scheme was conceived in the interests and enured to the benefit of the Company as a whole and was a scheme to which, if its terms were fair to each class affected, the directors were entitled to call for the support of all classes of shareholders. And in viewing the position of the deferred shareholders on the footing that their strict legal rights under the articles had been superseded, I did not consider that in the circumstances any bargaining advantage they might originally have possessed by reason of the fact that their separate consent to any reduction was, in effect, essential, ought now to be taken into account. They had lost in this last phase any initial advantage of that type. Accordingly, as I thought, the reduction might in the result be held to be fair to them, if interpreting the scheme in its business sense the ordinary share which under it they were to receive in exchange had been shown to be the fair equivalent of every four of their unreduced deferred shares. On this aspect of the case I did feel the difficulty that in fixing that proportion no allowance appeared to have been made for the advantage already referred to which accrued to the old ordinary shareholders from the transfer to capital reserve of the 5,434,141*l.* theretofore credited to the deferred shares alone. But on consideration it appeared to me that this item, large as it was, ought not finally to weigh in the balance against the positive, independent, and highly instructed opinions of Sir Albert Wyon and Sir William McLintock that the scheme was in their judgment entirely fair to the deferred shareholders. I did not ignore other circumstances leading to the same result. But their testimony, entirely disinterested, I felt I might properly accept. Accordingly, and subject only to the question whether the extraordinary resolutions at the class meetings had been duly passed at separate meetings properly so described I reached the conclusion that the reduction might properly be confirmed by this House.

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(1) 40 Ch. D. 363.

That question, so reserved, raised however a very serious issue of wide general importance. I cannot myself accept the view so far judicially taken of the procedure here followed on May 1, 1935. It would, I think, be unfortunate indeed if the procedure then adopted were to go forth approved by this House as procedure to be followed or adopted under similar circumstances in future. Eve J. has said of the three last meetings of May 1, 1935, that they were organized with remarkable skill. And as an arrangement designed to consult to the utmost the convenience of the shareholders likely to attend, I agree. But the price paid at the end of the day, in my judgment, was that anything valuable and distinctive in a separate class meeting—and there were two of these—was thereby sacrificed.

My Lords, had the order of procedure foreshadowed in the notices convening the meetings been in any true sense realized, no objection technical or substantial would have now been competent. The form of notice seemed to presuppose that there had to be three specific meetings—the first an extraordinary general meeting consisting of all shareholders in the Company—preference, ordinary and deferred—at which the scheme in all its details, as affecting the Company generally, would be submitted for approval by special resolution ; the second a meeting of the ordinary shareholders only at which the scheme as affecting their particular class interests would be submitted to them separately for approval by extraordinary resolution ; and the third, a corresponding meeting of deferred shareholders only, similarly convened to approve of the scheme as specially affecting their class interests in the sense already discussed. These meetings were convened for 10.45 A.M., 11 A.M. and 11.15 A.M. respectively, or so soon thereafter as the immediately preceding meeting should be concluded. But on the day itself no attempt was made to separate the shareholders alone entitled to be present at either class meeting from the whole body of shareholders summoned for, entitled to be present at, and to take part in, the general meeting. These did so assemble at the appointed hour of 10.45 A.M. to the number of about 1600, and after the show of hands on the resolutions and a poll demanded in writing by the chairman to be taken immediately, they were informed that their voting papers on the poll would be collected at the doors after the close of the final, the deferred shareholders', meeting. In other words all present were invited to remain seated as they were until the business of the last of the meetings, which only a fraction of the assembly was entitled to attend, had concluded. This invitation, taken in connection with an announcement at the commencement made by the chairman before beginning his speech, was an intimation that the period of waiting would not be prolonged. Doubtless, therefore, very few of those present left before the end.

The announcement referred to was the death-knell of a separate meeting in any deliberative sense. After stating that the general meeting would be followed by the class meetings to each of which an extraordinary resolution would be submitted, the chairman proceeded: "I propose, with your approval, to make one speech in relation to these three meetings, and therefore to take the vote at the two subsequent class meetings of the ordinary shareholders and the deferred shareholders respectively without any further speeches."

And everything followed according to that plan. No speeches except at the general meeting were made by anybody. An unsuccessful attempt was made by a deferred shareholder to speak after the deferred extraordinary resolution had been read out by the chairman to the so-called deferred separate meeting, but, as described by Clauson J., the attempt was made "with so little insistence that it cannot be treated as affecting in any degree the regularity of the chairman proceeding to put the resolution to the vote." At the general meeting a confused discussion followed the chairman's speech, during which in illogical sequence the issues suitable for discussion by the shareholders generally, as well as those more or less appropriate to the ordinary and deferred shareholders separately, were ventilated by individual shareholders. And then discussion ceased and it was never again renewed. The proceedings at each separate meeting (if such it can be called, with the whole general body of shareholders remaining in their places) consisted in the chairman reading the extraordinary resolution, then calling for a show of hands, and thereupon, whether the result was for or against the resolution, demanding a poll to be taken at once. And that was all.

Now, my Lords, in the above circumstances I ask myself when did either separate class meeting commence? The business of each meeting certainly commenced with the

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chairman's speech to the general meeting. He said so. But if the class meetings then commenced they did so before the time for which either was convened, probably two hours before. It must also on that view be taken that there were one general and two separate meetings proceeding simultaneously under one chairman. If, however, the separate meeting, say of the deferred shareholders, did not commence until after the proceedings of the ordinary shareholders' meeting had concluded—and this is the view of the Company—then it was a meeting at which nothing in fact took place and nothing was intended or arranged to take place except that the resolution should be read, a show of hands asked for, with neither explanation given nor discussion invited, and then a poll demanded to be taken at once. The separate meeting on this hypothesis consisted in a resolution read, a show of hands asked for, and a poll demanded. Is this the position to which a deferred shareholder attending that meeting at the appointed time, and not earlier, may properly be relegated ? That must be the contention. But when it is remembered that all this took place in the presence of the great bulk of the shareholders of all classes originally assembled, it seems to me impossible to hold that any meeting on that day was a separate class meeting in any sense of those words not wholly inappropriate. A far more accurate description of the relevant proceedings of the day regarded objectively would be that they consisted of one general meeting and two separate polls. Let it be agreed that the result of each of the two separate polls was accurate in every particular ; still it is a separate meeting and not a separate poll that is required by this Company's memorandum of association. And there is a wealth of meaning in the distinction.

But nevertheless it is, doubtless, because of the accuracy of the result of the polls—the final deliverance—that the procedure adopted is in its result sought to be justified. And it is at this very point, as it seems to me, that one material defect in the procedure is disclosed. For if I must condescend upon the question, what essential condition of a separate meeting was on this occasion broken, I would say that one such breach consisted in this, that the meeting was so held that there could not be a reliable show of hands—an essential preliminary basis for all subsequent procedure including the demand for and the taking of the poll. It is true that the chairman at the deferred meeting said that only deferred shareholders were to hold up their hands. No one, however, can say, the chairman, perhaps, least of all, whether all of the shareholders present not being deferred shareholders were obedient to his command. It is said both by the learned judge and by Clauson J. that no wrong voting is shown and doubtless there was none so far as the poll is concerned. But it would need an indefinite number of affidavits, many hundreds, I presume, to establish the same negative fact in relation to the show of hands. It has not been shown that there was then any wrong voting. No more than that can be said, and that is not, I suggest, enough. A show of hands is the constitutional method of declaring the will of a meeting. It stands as the resolution of the meeting, unless the declaration of the chairman that the proposed resolution is thereby carried or lost is subsequently displaced by the result of a poll thereafter duly demanded and taken. But from the very nature of the case there can, I suggest, be no valid demand for a poll unless there has been a valid show of hands. And that there was a valid show of hands at this so-called separate meeting it is impossible to affirm. The explanation of all that happened in this respect on May 1, 1935, is doubtless that the show of hands in view of the chairman's intention to demand a poll, whatever its result, was regarded as an empty ceremony of no significance, whereas it did remain the common law expression of the meeting's will, and had to be respected accordingly.

Clauson J. in his judgment asks whether, if it met together, the meeting of the deferred shareholders was not a good separate meeting of the class "merely because," as he puts it, "some strangers to whose presence nobody, in fact, objects, are within the same four walls." The same question might be asked and presumably would receive the same negative answer in relation to the meeting of the ordinary shareholders.

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My Lords, with all respect I cannot recognize in the question an adequate description of the situation. And the danger of accepting the test as applicable to what really happened is, that by that acceptance, every element of value in a class meeting is lost. The opportunity afforded to the class of discussing their own affairs undisturbed by opposing or conflicting interests is the modest protection against possible oppression offered by a class meeting. How weak that protection often is, owing to conflicting interests within the class itself, is only too well known and is illustrated perhaps in this case. But the protection is worth preserving faute de mieux. I can only hope with my noble and learned friend that the result of this case will be that the procedure adopted in this instance will not be, in like circumstances, repeated. My own opinion, however, was that the deferred shareholders' meeting —it alone happens to be attacked—was not a separate meeting within the meaning of this Company's memorandum of association and that apart from waiver, it could not be so regarded. Your Lordships, I believe, support the resolution then passed because you find in the proceedings of the meeting as proved sufficient evidence that every non-compliance with essential conditions was duly waived by those deferred shareholders who were present. I cannot myself read all that into the evidence, but mainly because of my fear that the acceptance of the evidence to that effect, such as it was, might be invoked in other cases to justify even further departure from essential conditions, I preferred to support the resolutions on another ground now to be stated, which is not open to this risk.

On this petition both the extraordinary resolutions which are said to have been passed on May 1, 1935, must, I think, be taken to have been duly passed, for the simple reason that the regularity of the meetings at which they were so passed is not, on this petition, as it is in the reduction resolution, directly in issue, and because no steps have been taken nor any threatened to question their regularity either by application under s. 61 of the Act, now too late, or by action properly constituted for that purpose. In the absence of any such proceedings the evidence filed proving the passing of the extraordinary resolutions must, I think, on this petition, be accepted as enough. It is sufficient to establish the presently relevant fact—namely, that there will be provided for the deferred shareholders everything that under the scheme they are to receive in return for their reduced share capital. It must therefore, I think, be concluded that the extraordinary resolution of the deferred shareholders is on this petition entitled to full effect according to its true meaning, and I have dealt with it above on that footing.

In the view which I have taken of this case generally I need hardly say that with the order made by the House as to the costs of the appeal I was in complete agreement. Had the case presented itself to the learned judge as it was presented here I cannot doubt that he would have allowed one set of costs to the dissentient deferred shareholders appearing before him, and it may even be that the Court of Appeal, had they found it necessary to call upon the respondent Company, might even have varied his order as to costs, especially if it had been brought to their attention that the deferred shareholders were at the meeting almost invited by the president of the Company and the chairman to place their views before the Court at the hearing of the petition which was then foreshadowed. It would, however, be out of the question that this House, dismissing the appeal, should interfere with an order as to costs that had been the subject of a double discretion. Nor could the House well order a successful respondent on a second appeal to pay the appellant's costs of that appeal. But the respondent Company's own costs of the appeal were within your Lordships' normal discretion and it was well, and to some extent a recognition of the service rendered by the appellant, that the Company should be left to bear its own costs of an appeal in which the appellant has been of real assistance to the House.

My Lords, as I was examining the statute of 1929 for the purposes of this opinion, I chanced upon a matter of real importance to all concerned in these matters, which was perhaps overlooked in this case. The question in no

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way affects the appeal, because it was neither raised nor argued by the appellant. I raise it, only, in the general interest.

Reading in the record the account of the extraordinary general meeting of the Company on May 1, 1935, I noticed that the chairman, on the failure of the special resolution to be carried on a show of hands, is reported to have said:. (Record p. 263.) "I . . . . give written notice in pursuance of article 59 of the Company's articles of association that I demand a poll and I direct in pursuance of article 60 that the poll shall be taken forthwith." And the allegation on this subject in para. 18 of the reduction petition is to the same effect. Now I am not suggesting that that demand was irregular. It has not been challenged, and I am not suggesting that its sufficiency could not have been established, if it had been. But the form of demand indicates that an important change in the law on this subject, introduced by the Companies Act, 1928, and brought into force by the Companies Act, 1929, may not yet be fully appreciated by the profession, and I draw attention to the change by way of warning to all concerned in the administration of Companies. Since the passing of that Act the procedure governing the demand of a poll when at any meeting an extraordinary or a special resolution as defined by the Act itself has on a show of hands been carried or lost has become statutory, and except to the extent referred to in the Act, is no longer as before governed exclusively by the articles of association of the Company concerned.

Sect. 117 of the Act of 1929 contains the provisions as to extraordinary and special resolutions which, like the special reduction resolution here, are statutory. Sub-s. 4 is as follows :—

"At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed a poll shall be taken to be effectively demanded if demanded

(*a*) by such number of members for the time being entitled under the articles to vote at the meeting as may be specified in the articles so, however, that it shall not in any case be necessary for more than five members to make the demand; or

(*b*) if no provision is made by the articles with respect to the right to demand the poll, by three members so entitled or by one member or two members so entitled if that member holds, or those two members together hold not less than 15 per cent. of the paid-up share capital of the Company."

The provisions of the sub-section are, it will be seen, not crystal clear. But under it the chairman of a meeting has no special privilege as such. If he is not a member—and in the respondent Company the chairman need not necessarily be a member—see Art. 82—he has in this matter under the sub-section no status at all. It may therefore be asked, is the provision made by the articles and referred to in sub-s. 4 (*b*) confined or not to a provision with respect to the right of members to demand a poll? Again it may be one day an interesting subject of discussion, whether, if the articles so provide, a single member, holding say one share, may demand a poll under sub-s. 4 (*a*), or whether, if not, he may notwithstanding sub-s. 4 (*b*) do so on the ground that the case is not one in which "no provision is made by the articles." All of which indicates how dangerous it may be to ignore these statutory provisions. If regard be had only to the articles there may always be a risk that the result of the poll irregularly demanded will, if challenged, be held to be otiose. The Act I would add deals only with extraordinary or special resolutions which are statutory. It does not, unless incorporated in articles by reference, apply to conventional extraordinary resolutions such as were here referred to in Art. 72.

LORD RUSSELL OF KILLOWEN. My Lords, having had the opportunity of reading and considering the opinion of my noble and learned friend Lord Maugham (with which I agree) I feel justified not only in dispensing with any recital of the relevant facts (of these I will assume the House to be fully

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seised), but also while making some additional observations of my own, in confining them within narrow limits.

The question which has given me the chief anxiety in this case is the question whether a separate meeting of the deferred shareholders, within the meaning of those words, was held. That the meeting was validly convened there can in my opinion be no doubt. The only suggestion to the contrary contained in the appellant's case is that a shareholder who held deferred shares, but no ordinary shares, would have no knowledge of the hour for which the class meeting of the ordinary shareholders had been summoned. For myself, I never could, nor can I now, appreciate this point, in view of the fact that the meeting of the deferred shareholders was summoned for a specified hour, though with an intimation that the actual commencement of the meeting would, if need be, await the conclusion of the meeting of the ordinary shareholders.

A further point was raised for the first time in this House, to the effect that the notice convening the meeting was an insufficient notice, because neither it, nor the resolution set out therein, referred to or covered a "reduction of the Company's capital affecting the class of shares in a manner not otherwise authorized by these articles." The relevant words are quoted from the 71st article of association. I will assume in his favour that it was open to the appellant in a case like this to raise such a point for the first time here, though I doubt whether it was; but there is, in my opinion, nothing in the point. The notice in question embodies the series of resolutions appended to the notice concerning the extraordinary general meeting, and these make quite plain the nature of the reduction which was proposed, and which was merely incidental to the main purpose—namely, the rearrangement of capital by the conversion of deferred shares into ordinary shares, one ordinary share of 1*l.* being substituted for four deferred shares of 10*s.* each.

The meeting having been properly convened, can it be said that the circumstances attending its holding were such as to invalidate its acts, or in other words, such as to justify us in

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holding that there was no resolution of the deferred shareholders? I have come to the conclusion that the answer should be in the negative. There are many matters relating to the conduct of a meeting which lie entirely in the hands of those persons who are present and constitute the meeting. Thus it rests with the meeting to decide whether notices, resolutions, minutes, accounts, and such like shall be read to the meeting or be taken as read; whether representatives of the Press, or any other persons not qualified to be summoned to the meeting, shall be permitted to be present, or if present shall be permitted to remain; whether and when discussion shall be terminated and a vote taken; whether the meeting shall be adjourned. In all these matters, and they are only instances, the meeting decides, and if necessary a vote must be taken to ascertain the wishes of the majority. If no objection is taken by any constituent of the meeting, the meeting must be taken to be assenting to the course adopted. It is not a case, as was suggested in argument, of those present at a meeting waiving rights of those who have elected not to attend; it is a case of those who have elected to attend regulating the conduct of the meeting, a question in which those who have chosen to stay away have no voice. I am, however, far from assenting to the view that all that is necessary to constitute a valid resolution by a separate class of shareholders, or a valid separate meeting of a class of shareholders, is that a separate vote of the class be taken in such circumstances as to ensure that all members of the class shall have an opportunity of voting, and that no one who is not a member of the class shall vote. Prima facie a separate meeting of a class should be a meeting attended only by members of the class, in order that the discussion of the matters which the meeting has to consider may be carried on unhampered by the presence of others who are not interested to view those matters from the same angle as that of the class; and if the presence of outsiders was retained in spite of the ascertained wish of the constituents of the meeting for their exclusion, it would not, I think, be possible to say that a separate meeting of the class had been duly held. In the present case, however, the deferred

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shareholders present, with knowledge that many were in the room who held no deferred shares, and that it was proposed that no further discussion should take place, but that a vote on the resolution should be taken, raised no objection, or at all events no audible objection, of any kind. In these circumstances they must be taken to have assented to the meeting being so conducted, and the resolution was accordingly a valid extraordinary resolution passed at a meeting of the deferred shareholders within the meaning of the 71st article of association. I would like to add that in my opinion the question of convenience or inconvenience should not enter into consideration. Those responsible for convening a series of class meetings may find it the more prudent course to summon such meetings at longer intervals or in different rooms, or even on different dates. The inconvenience and extra expense involved are an unfortunate result of the modern phenomenon of colossal companies with phalanxes of shareholders.

As regards the contention of the appellants that there was no power in the Company to reduce its capital except by paying off what was termed in argument " redundant capital," and that the reduction here proposed was therefore ultra vires, I need only say that I agree with the views of Eve J. and the Court of Appeal—namely, that upon the true construction of the 44th article of association the Company had power to reduce its capital in any way authorized by the Companies Act, 1929.

The appellants, however, contended that the Court should not have confirmed the reduction of capital, because the circular issued by the directors to the shareholders was, by reason both of what it contained and what it omitted, of such a nature that the holders of deferred shares were not placed in a position which enabled them properly to judge and vote upon the board's proposals. It must be borne in mind that throughout these proceedings, the objecting shareholders have emphatically, even ostentatiously, disclaimed any hint or suggestion against the integrity or good faith of the directors. Nor has any holder of deferred shares come forward to say that he was in any degree wrongly influenced or misled by the circular. Having carefully considered the various matters in respect of which the circular was criticized before this House, I have no hesitation in agreeing with the views of Eve J. and the Court of Appeal—namely, that no refusal to confirm the reduction resolution could properly be based upon criticism of the circular.

In the final resort it was urged by the appellants that the reduction of capital should not be confirmed because the scheme for the rearrangement of the Company's capital (in which, be it observed, the reduction was only an incident) operated unfairly to the holders of deferred shares.

The Court of Appeal disposed of this contention by saying that the question whether it was to the advantage of a class to accept a particular modification of their rights was eminently a question of which the shareholders were much better judges than the Court; and that nothing had been placed before the Court which would justify an overruling of the shareholders' decision. I would rather put the matter thus, in view of the large number of votes in favour of the scheme given, at the meeting of deferred shareholders, by persons who also held ordinary shares—that in the present case the Court should itself decide the question upon the evidence before it, and that judging the question of fairness or unfairness upon the evidence in the case, both affidavit evidence and oral evidence, I am satisfied (no matter where the onus originally lay) that the scheme for rearrangement of the Company's capital is one which is fair to both classes, both the holders of deferred shares and the holders of ordinary shares.

In the result I agree that the appeal was rightly dismissed, and in the special circumstances of the case, without costs.

I desire to keep open the question whether it is competent for an individual shareholder to appeal on behalf of others as well as himself, and to represent them on the hearing of the appeal; or whether it is not necessary that any one who wishes to be represented on the hearing of an appeal and to be heard in support thereof, should be joined as an active appellant, with all the risk of liability which attaches to such an activity.

Lord Maugham. My Lords, this is an appeal by the appellants from an order of the Court of Appeal (Lord Wright M.R., Romer L.J. and Clauson J.) unanimously affirming an order of Eve J., dated November 13, 1935, and made on a petition presented by the respondent Company, Imperial Chemical Industries, Ld. (whom I shall call "the Company"), to the Chancery Division of the High Court of Justice, confirming a reduction of the capital of the Company from 95,000,000*l.* to 89,565,859*l.* The case for the appellants is that the petition should have been dismissed and that the judgments of the learned judge and of the Court of Appeal should be reversed. [His Lordship stated the facts as above set out and continued:]

My Lords, I have thought it necessary to state the facts in some detail because the questions which arise on the appeal are not without some novelty and difficulty. On the one hand the reduction of capital which the Court was asked to confirm was one of those very unusual reductions in which no paid up share capital had been lost or was unrepresented by available assets and no paid up share capital was being paid off as being in excess of the wants of the Company. On the other hand the class meetings of the holders of ordinary and of deferred shares respectively were not separate meetings in the usual meaning of the word "separate," but meetings of all the shareholders together at which the votes of the holders of the two classes were separately counted. The course taken as regards these meetings was one which required careful consideration; such a course appears never to have had the approval of the Court on any previous occasion. It should also be observed that the extraordinary resolutions purporting to modify the rights of the holders of the ordinary and deferred shares respectively, based as they were on Arts. 71 and 72 of the articles of association, did not require the approval or confirmation of the Court. Their validity might have been challenged by an application under s. 61

of the Companies Act, 1929. That section, however, requires the application to be made within seven days after the date of the resolution and to be supported by not less than 15 per cent. of the issued shares of the class concerned—conditions with which it is often impossible to comply. In the absence of such an application, shareholders who wish to attack such a resolution may no doubt commence an action for the purpose. On an application under the section, the minority shareholders have to satisfy the Court that the variation of rights "would unfairly prejudice the shareholders of the class represented by the applicant." It would seem that if an action is brought the plaintiffs would have to prove at least that the majority have unfairly oppressed the minority. It may be that the onus and the evidence in support in the two cases would not be very different. When however, as in the present case, neither course has been taken, it is difficult to see how the validity of the resolutions (if duly passed) can be disputed; for the shareholder's vote is a right of property, and prima facie may be exercised by a shareholder as he thinks fit in his own interest. However, the appellant was permitted to challenge the validity of the resolutions altering rights on the petition for reduction of capital. There were, no doubt, strong reasons of convenience in allowing that to be done; and in the circumstances I am content to accept that course as being a regular one. It must, however, be borne in mind that the appellant is in a different position in attacking the extraordinary resolution altering the rights of the deferred shares from his position as appearing to oppose a petition to confirm the reduction of capital. It was part of the bargain under which he held his deferred shares that their rights might lawfully be altered under Art. 71, and if the extraordinary resolution above set forth was passed by the requisite majority, and he could not establish that the resolution involved an oppression of the minority (see *Cook* v. *Deeks* (1) and cases there cited), the Court would have no power to interfere. On the other hand on the application under s. 55 of the Act to confirm the reduction, the Court, whether or not the petition is opposed, has a duty to consider whether the proposed reduction is a fair or an unfair one.

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(1) [1916] 1 A. C. 554.

Three main points were urged on behalf of the appellant. First it was contended that the reduction of capital was ultra vires the Company, since Art. 44 did not empower the Company to reduce its capital by cancelling the five and a half million of deferred share capital merely for the purpose of a reorganization of capital. This argument involved a strangely limited meaning being given to the words "or otherwise as may seem expedient" in the article. I agree with Eve J. and the Court of Appeal in thinking that the Company by Art. 44 took power to reduce its capital in any way authorized by the Companies Act, 1929. Ever since the decision of this House in *Poole* v. *National Bank of China* (1) it has been clear that such a reduction as the one proposed was not unlawful (apart from the question of fairness), and the language of s. 55 of the Act of 1929 recognizes the correctness of that decision.

The second objection is as to the class meetings. Art. 71 requires the assent of the shareholders of each class by an extraordinary resolution, passed at a meeting of such class. Such a meeting is referred to in clause 6 of the memorandum as "a separate meeting of the holders of shares of the class." It was contended on behalf of the appellant that, in the circumstances above detailed, there was no separate meeting of the holders of the deferred shares, nor was there a separate meeting of the holders of the ordinary shares; and if that contention were held correct the whole scheme would become inoperative. I will say at once that on this point I cannot view the matter from exactly the same angle as the Court of Appeal. The argument from convenience is not a strong one in a case where the rights of persons may be altered to their prejudice if certain definite things are done. In such a case the doing of the things generally speaking is a condition upon the performance of which the rights may be altered. The question therefore is whether there were in fact separate meetings of the two classes. According to the ordinary

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(1) [1907] A. C. 229.

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notions of commercial men and investors a meeting (to take that case) of deferred shareholders in a hall where there are an equal or greater number of holders of ordinary shares would not be described as a separate meeting of deferred shareholders, even if the ordinary shareholders were told by the chairman that they must neither speak nor vote. It is not difficult to imagine a case where the presence of a number of persons with conflicting interests would render it impossible for members of the class adequately to discuss the matter from their point of view. Meetings of members of companies are not always conducted in an orderly fashion. There is often a hubbub of sound which drowns a speech which might otherwise have a great effect. Members of another class by merely indulging in coughs or groans or neighbourly conversation might seriously prejudice speakers who were supporting a view which did not commend itself to that class. Other objections will readily occur to any one who knows how meetings of this kind are frequently conducted. In my opinion the better and the wiser course is to make provision for the holding of truly separate meetings in the ordinary way, even at the risk of some inconvenience. It does not, however, follow in the circumstances of this case that the extraordinary resolutions were void. It is necessary in the first place to distinguish between the summoning of a meeting and its conduct when the shareholders meet. In the present case I can see no ground for the suggestion that separate meetings of the ordinary and deferred shareholders were not duly summoned. As regards the conduct of such a meeting that is a matter largely in the hands of the chairman with the assent of the persons properly present. Just as documents which have to be presented to a meeting can be taken as read, and just as a meeting can decide either that an untiring speaker shall be no longer heard, or that a much debated question shall be put to the vote without further discussion, so in my opinion the holders of deferred shares were entitled to waive the objection to the presence of strangers, including holders of ordinary shares, and if they chose to do so it would not, I think, be open to any one to assert that the meeting was not being properly held within the meaning of Art. 71. To this the important fact should be added that the chairman was in a position to demand a poll, that he had already determined to do so, and that he held sufficient proxies to carry the resolution. In such a case the speeches and the voting on a show of hands become little more than formalities; all that is necessary is that there should be a class meeting duly constituted at which a poll can properly be demanded. The conclusion at which I arrive is that in the circumstances the meeting of deferred shareholders was properly convened, that the objection which might have been raised to the presence of holders of shares of another class was waived, that the poll was duly demanded and that the extraordinary resolution was passed by the requisite majority. It might have been better if the chairman had told the holders of deferred shares that the matter of the exclusion of others rested with them and if he had invited an expression of their views; but in the circumstances and in the absence of any audible protest I think he was justified in taking their assent for granted.

The third point taken was that the Court ought not to have confirmed the reduction having regard to the contents of and the omissions from the circular issued by the directors, and the unfairness of the scheme as a whole to the holders of deferred shares. As regards the circular I entirely agree with the way in which Clauson J. in delivering the judgment of the Court of Appeal has dealt with this point and I need not repeat what he said. It is indeed difficult to see that the criticism of the circular can have any real weight when it is remembered, first, that counsel for the appellant has with equal candour and fairness explained in each tribunal that he was making no attack whatever on the directors and was admitting their complete good faith and, secondly, that no single holder of deferred shares has come forward to state on affidavit that he had been in the least misled by the circular. For my part I think the directors were well advised in not adding to the voluminous documents which the secretary sent to the shareholders on April 6, 1935. The salient and

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most important of the facts necessary to enable a deferred shareholder to form a judgment on the scheme were in my view stated clearly and fairly in the circular.

The question as to the fairness of the reduction coupled with the scheme as a whole is not I think quite so easy to deal with for the following reason. Both Eve J. and the Court of Appeal seem to have laid considerable stress on the well known proposition, laid down in *English, Scottish and Australian Chartered Bank, In re* (1) and often followed, that shareholders acting honestly are usually much better judges of what is to their commercial advantage than the Court can be. I do not intend to throw the smallest doubt on this general proposition, which I have had occasion more than once to repeat, but I doubt very much whether it is of great value as a guide when it is proved that the majority of the class have voted or may have voted in the way they did because of their interests as shareholders of another class. If the Court is satisfied that the deferred shareholders in this case " considered the matter from a proper point of view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the Court ought to be slow to differ from them." (I am here citing from the judgment of Lindley L.J. in the case cited and from the same page.) But it is strongly argued for the appellant that an analysis of the figures as to voting shows that so many persons, holders of deferred shares and of no ordinary shares, were opposed to the scheme that an inference should be drawn that the majority in favour of the scheme could not have considered the matter with a view to the interests of holders of deferred shares only. There is weight in this contention and I have thought it necessary to pay little attention to the majority on the poll in favour of the scheme in considering whether it is a fair one.

In the first place I will repeat that the onus is on those who say the scheme, so far as alteration of rights is concerned, is unfair; the deferred shareholders have consented to it under Art. 71, and those who contend that

(1) [1893] 3 Ch. 385, 409.

the interests of the minority are being unfairly overriden by persons with other and conflicting interest, must prove it. A passage from Buckley on the Companies Acts (11th ed., p. 121) is no doubt a correct statement: "Where the memorandum or articles contain a clause empowering a specified majority of the holders of any class of shares to sanction modifications of the rights of the shares of that class, any scheme for reduction which is sanctioned in accordance with such clause by the classes affected thereby is prima facie a reduction in accordance with the legal rights of the shareholders." I will add that the cancellation of the five and a half millions of deferred share capital seems to me to be part of the bargain approved by the deferred shareholders under Art. 71, and is not, I think, a subject for separate consideration.

Secondly, I think the fairness or unfairness of the scheme as a whole, including the reduction, is not a matter for the discretion of the learned judge in a technical sense, but is a matter to be decided on the evidence. The question in this case depends on the view which should be taken as to the future commercial success of the Company. We are not entitled to substitute our own views for those of the directors and experts who have given evidence. Considerable importance should be attached to the unanimous opinion of the directors whose good faith I repeat is not in question, and having regard to their standing and position I think little weight can be given to the circumstance that their combined holdings are predominantly in ordinary shares. I am also impressed by the fairness and candour with which the experts called on behalf of the Company gave their evidence.

Thirdly, it is important to note the nature of the question which arose. As Clauson J. observed: "The matter for consideration is a comparison of two types of shares, first a share which carries with it no revenue until the amount to be distributed in dividend passes a certain definite point, and when that point is passed, carries by way of revenue a rapidly increasing proportion (relative to paid up capital) of the fund divided, and second a share which carries revenue up to the definite point without competition from any other class and from that point carries by way of revenue a rapidly diminishing proportion (relative to paid up capital) of the fund divided. The comparison is made in order to fix a rate at which the share of more speculative character is to be exchanged for a share of the less speculative character. Whether an individual holder of an ordinary or a deferred share approves the rate suggested will depend on the estimate which he forms of the relative prospects of the two classes of share, in view of the particular circumstances of the Company's business."

The question then for us is whether upon the evidence we ought to come to the conclusion that the future of the Company, dependent as it is on a hundred contingencies and chances, is such that deferred shareholders are being unfairly treated for the benefit of ordinary shareholders in that the terms on which the deferred shares are to be converted into ordinary shares ought to be more favourable to the former than on the basis of four deferred shares for each ordinary share. I have anxiously considered the whole of the evidence that was put before us on this point, considering it altogether apart from the actual result of the poll, and I am quite unable to come to any such conclusion. I see no unfairness in the terms of proposed conversion; certainly none has been established on the evidence. This point therefore also fails.

As regards costs it may be pointed out that not only is this a case where very large sums are involved but it is also one as I have already said where there are questions of novelty and of some difficulty. A judge hearing such a petition under s. 55 of the Companies Act, 1929, is generally not unwilling to have the objections to it argued by experienced counsel, and to allow the opponents their costs. The learned judge, however, thought fit to take the stricter course. We could not interfere with his discretion, but in all the circumstances I readily agreed with the course which commended itself to your Lordships, namely to dismiss the appeal without costs.

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Ordered and adjudged that the order of the Court of Appeal complained of be affirmed and the appeal dismissed; and further ordered that there be no costs of the appeal to this House.

Lords' Journals, Nov. 13, 1936.

Solicitors for appellant: *Nordon & Co.*
Solicitor for respondents: *William Morris.*

[HOUSE OF LORDS.]

IZZARD . . . . APPELLANT;

AND

UNIVERSAL INSURANCE COMPANY, LIMITED . . . . RESPONDENTS.

H. L. (E.)*

1937

May 3, 4; June 1.

Insurance (motor-car)—Third-party liability—Owner of motor vehicle insured in respect of death of person caused by use of vehicle—Insurer not to be liable in respect of person carried other than passenger carried by reason of contract of employment—Whether "contract of employment" with insured person only—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 36, *sub-s.* 1.

A policy of insurance was taken out by D. in respect of a motor vehicle. The policy, which was headed "Commercial motor policy," incorporated a previous proposal by D. in which he had given a warranty or undertaking that passenger risk was not to be covered; it provided that the vehicle would be used only for general haulage and other trades, and that the insurance company would indemnify D. against liability in respect of "death of or bodily injury to any person caused by or arising out of the use of the vehicle . . . . Provided always that the company shall not be liable in respect of . . . . (*b*) death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment; (*c*) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon . . . . such vehicle":—

Held, that the language of clause (*c*) was not to be construed as applying only to the death of or injury to a person in the employment of D. while being carried on the vehicle; that it applied to any person being carried in pursuance of a contract of employment with another employer; and therefore when such a person, while being carried on the vehicle, was killed owing to the negligence of the driver, the insurance company was bound to indemnify D. in respect of his liability to the representative of the deceased person.

Decision of Court of Appeal [1936] 2 K. B. 555 reversed.

APPEAL from a decision of the Court of Appeal on a special case stated by an arbitrator.

By a policy dated November 30, 1933, and headed "Commercial motor vehicle policy" the Universal Insurance

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROCHE.

Co., Ld., insured one William Druce of Didcot, hereinafter called "the insured," described therein as "a haulage contractor, dairyman, sand and gravel merchant, coal merchant and farmer" in respect of a commercial motor vehicle, and it was therein provided (inter alia) as follows:—

"SECTION II.—LIABILITY TO THIRD PARTIES."

"(1.) The company will indemnify the insured against liability at law for compensation and claimant's costs and expenses in respect of:—

Death of or bodily injury to any person caused by or arising out of the use" of the said vehicle . . . .

"Provided always that the company shall not be liable in respect of:—

(*a*) . . . .

(*b*) Death of or bodily injury to . . . . any person in the employment of the insured arising out of and in the course of such employment;

(*c*) Death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon . . . . such vehicle at the time of the occurrence of the event out of which any claim arises . . . ."

Under the heading "General Exceptions of the Policy" it was provided:—

"The company shall not be liable in respect of:—

(1.) Any . . . . liability caused, sustained or incurred whilst such vehicle is:—

(*a*) . . . . being used otherwise than for the purposes mentioned in the Schedule hereto . . . . or is being used for hire or reward . . . .

(3.) Any contractual liability."

The Schedule contained the words: "Warranted used only for general haulage and other trades."

By a proposal form dated November 17, 1933, which was stated in the policy to be the basis of the contract and incorporated therein, Druce, in stating the benefits he required, answered the question: "Is passenger risk to be covered?" with the word "No."

The policy complied with the requirements of the Road Traffic Act, 1930, s. 36, sub-s. 1 (*b*) (ii.), and the proviso contained in s. 2, clause (i.) (*c*), of the policy followed the wording in that sub-section.

By a verbal contract made in April, 1934, between Industrial Builders, Ld., hereinafter called " the builders," then developing a building estate at Coventry, of the one part, and the insured of the other part, the insured agreed to do haulage work for the builders between Didcot and Coventry and to put a lorry at their disposal for the conveyance of workmen between those places at the week-ends for 35*s*. per journey whether men were carried or not.

By a verbal contract made in April, 1934, between the builders and one Izzard, a carpenter, who lived at Didcot, it was provided that he should work for them at Coventry on the terms that he should get a certain rate of pay and that a lorry should be at his disposal for going home at week-ends.

On July 21, 1934, Izzard was being carried home on the insured's vehicle by the insured's servant when it overturned, with the consequence that Izzard sustained such injuries that he died on the following day. In respect of this Izzard's widow—the present appellant—brought an action against the insured under Lord Campbell's Act and recovered judgment for 850*l*., but as the insured was thereafter adjudicated bankrupt his rights against the company were transferred to and vested in the appellant by virtue of the Third Parties (Rights against Insurers) Act, 1930, and thereupon she claimed the amount from the company.

By an agreement between the company and the appellant her rights under the policy were referred to an arbitrator, who found in favour of the appellant and his decision was affirmed by MacKinnon J., but that judgment was reversed by the Court of Appeal (Greer L.J. dissenting), Slesser and Scott L.JJ. taking the view that the expression " contract of employment " in clause (*c*) above set out was limited to a contract of employment between a passenger, whose death or injury was caused by the use of the vehicle, and the insured, and that inasmuch as the policy purported to eliminate passenger risk, the company was not liable to indemnify the insured against liability for the death of a passenger carried in the vehicle by reason of or in pursuance of a contract of employment with some person other than the insured.

The widow appealed to this House.

1937. May 3. *H. D. Samuels K.C.* and *Soskice* for the appellant. The words in the policy upon which we rely, "under a contract of employment," should be given their plain meaning as denoting a person who was on the motor vehicle at the material time by reason of any contract of employment, there being no reason for narrowing the words into a contract of employment with the insured person. If the words were to be so restricted they would have a very limited application, and if that had been intended the company would have said so in terms. [*In re Morgan and Provincial Insurance Co.* (1) was referred to.]

A. T. Miller K.C., *Tristram Beresford K.C.* and *C. Nyholm-Shawcross* for the respondents. Scott L.J. put metaphorically but quite accurately the position when he said (2): "The lorry was in fact being brought back to Didcot, like a cargo ship, so to speak, to its home port, at the end of the week's haulage work, which was at Coventry. If I may continue my nautical metaphor, instead of bringing the ship back in ballast, it was converted into a passenger ship and chartered for a lump sum freight to Industrial Builders, Ld., for the carriage of their men to Didcot. . . . . As regards the relationship between Izzard and the insured, he was a complete stranger for all purposes to the insured, and he was in no relationship at all material to any question in the case except to and with his employers, the building company." By the proposal it was stated that passenger risk was not to be covered, and on that account a smaller premium was paid. Neither the company nor the insured contemplated insurance of passengers except those who were carried by reason of their contract of employment with the insured. The other words were intended to cover servants of the insured who by

(1) [1932] 2 K. B. 70.

(2) [1936] 2 K. B. 555, 575.

reason of their remuneration were excluded from the benefit of the Workmen's Compensation Act. The insured was required to get cover for risks affecting persons in his employment and no others. [*Lees* v. *Dunkerley Brothers* (1) and *St. Helens Colliery Co.* v. *Hewitson* (2) were cited.]

The House took time for consideration.

June 1. Lord Wright. My Lords, the claim out of which this appeal arises is against the respondent company under a policy of insurance dated November 30, 1933, issued by them to William Druce on a commercial motor vehicle against various risks, including liability to third parties. The appellant is a widow whose husband had been killed by the negligence of a servant of Druce. She recovered damages on that ground against Druce under Lord Campbell's Act. Druce having become bankrupt, the appellant sued the respondents on the ground that Druce was entitled under the policy to be indemnified by them in respect of the third party liability and that the appellant had now a direct claim against the respondents vested in her in virtue of s. 1 of the Third Parties (Rights against Insurers) Act, 1930. The respondents dispute the claim, contending that under the policy the particular liability is not covered.

Druce had been in business as (inter alia) a haulage contractor at Didcot. The policy in question was described as a Commercial Motor Vehicle Policy and was on a Fordson truck warranted used only for general haulage and other trades. It incorporated a proposal which was declared to be the basis of the contract. This proposal, so far as it is here material to refer to it, stated that the vehicle would be used in connection with the assured's general business, including general haulage. While it specified third party risk as one of the benefits to be covered, it expressly negatived that passenger risk was to be covered. I shall refer in more detail to the proposal and policy when I have stated the relevant facts which are to be found in the award stated in the form of a special case for the opinion of the Court. The learned arbitrator found in favour of the appellant and his decision was affirmed by the judgment of MacKinnon J., but that judgment was reversed in the Court of Appeal by Slesser and Scott L.JJ., Greer L.J. dissenting and agreeing with MacKinnon J. Hence this appeal.

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(1) [1911] A. C. 5.

(2) [1924] A. C. 59.

The deceased man, Bernard George Izzard, was employed at the time of the fatal accident by Industrial Builders, Ld., who were engaged in building operations at Coventry. They had entered into a verbal contract with Druce that he should do haulage work for them between Didcot and Coventry and at Coventry, and should also put a lorry at their disposal every week-end for the conveyance of workmen from Coventry to Didcot and from Didcot to Coventry. Izzard lived near Didcot and agreed to work at Coventry on the terms of being paid increased pay while at Coventry as compared with his pay while working at Didcot, and of having a lorry at his disposal if he desired to go home to Didcot at week-ends. Accordingly he went home to Didcot every Saturday and returned to Coventry every Monday. In that state of affairs on Saturday, July 21, 1934, he met his death while being carried back to Didcot on the insured vehicle. The arbitrator in these circumstances found that Izzard was being carried as a passenger on the vehicle by reason of and in pursuance of a contract of employment, that his death was caused by and arose out of the use of the vehicle, and that at the time the death was caused the commercial motor vehicle was being used for a purpose mentioned in the schedule to the policy—that is to say, general haulage and other trades.

On these findings the question was whether the respondents were liable to the appellant. To answer the question it is necessary to refer in more detail to the proposal and policy. The proposal is on a form which is adapted to be used in reference to two classes of cars, private hire cars and commercial (goods carrying) vehicles. There is a separate schedule for each class. Both schedules cover risks such as accidental damage, fire, theft. But in respect of the private hire cars, that is, cars other than taxi-cabs, which are hired out by previous orders, liability to passengers, as might be expected, as well as third party liability, is included. In the commercial vehicles there is no head of liability to passengers, but there is a head of third party liability. It is this omission of liability to passengers which in my opinion is indicated by the words on the face of the proposal " Is passenger risk required to be covered? No." But the scope of the third party liability intended thereby to be covered is shown by the terms of the policy, as contained in section II., headed " Liability to Third Parties." That section provides that the company will indemnify the insured against liability (inter alia) in respect of death or bodily injury to any person caused by or arising out of the use of the vehicle, including the loading and unloading of it. This indemnity is subject to certain exceptions or provisos, of which it is here necessary to particularize two: " (*b*) Death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment; (*c*) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from such vehicle at the time of the occurrence of the event out of which any claim arises."

It is clear that though passenger risk in the full sense of the term is excluded, a certain limited class of passenger risk is specifically covered—namely, that described in the words in brackets in (*c*) quoted above which is in the form of an exception to an exception, and thus constitutes a positive cover. The crucial question is whether these words cover the particular liability which is claimed to exist in this case.

It will be convenient before seeking to answer the question to dispose of certain difficulties which have been raised. It was contended on behalf of the respondents that the express negation of passenger risk on the face of the proposal made it impossible to bring in the limited passenger risk specified in (*c*) quoted above. I think there are at least two sufficient answers to this objection. The first is that though the warranties and conditions expressed in the proposal are declared to be basic conditions of the policy, that must be subject to their being overridden by any express terms to the contrary effect in the actual policy. No doubt the proposal conditions and the express conditions of the policy must be read together and, as far as may be, reconciled, so that every part of the contract may receive effect. But if there is a final and direct inconsistency, the positive and express terms of the policy must prevail. If the proposal by itself is read as negativing absolutely any cover of passenger risk, the policy which incorporates the proposal must be construed as limiting that generality to the extent expressly provided by (*c*) which must pro tanto prevail. But there is a second answer to the objection, which is that in my opinion it is based on a misunderstanding of the proposal. What is negatived under the head of passenger risk is the full passenger risk required in the case of "private hire cars," but not required in the case of commercial vehicles. The limited passenger risk now in question, whatever its extent, is merely part of the third party liability which the proposal requires. The respondents' contention, if accepted, would have the effect of excluding the risk altogether. It seemed to be suggested that, if it had not that effect, it might somewhat modify the construction of (*c*). No such middle view is, however, in my opinion, tenable.

I may note in passing that the arbitrator's findings of fact quoted above show that the conditions have been satisfied that the death should arise out of the use of the insured vehicle, and that at the time of the accident the vehicle should not be used otherwise than for the purposes mentioned in the policy.

The substantial objection which was raised on behalf of the respondents, and which found favour with the majority of the Court of Appeal though rejected by the arbitrator, MacKinnon J. and Greer L.J., was that the bracketed words in (*c*) must be limited by reading "by reason of and in pursuance of a contract of employment" as meaning "a contract of employment with the Insured." The contract of employment which the arbitrator found was a contract not between

Izzard and Druce, the insured, but between Izzard and Industrial Builders, Ld., for whom he was working under a contract which included as one of its terms the option of being conveyed between his home at Didcot and the work at Coventry at week-ends. If correctly construed the policy did not, it was said, cover the risk, because the only contract of employment that could have been relevant was one between Izzard and Druce.

I must now refer to s. 36, sub-s. 1 (*b*) (ii.), of the Road Traffic Act, 1930, the requirements of which the arbitrator holds were complied with by the policy. By s. 35, sub-s. 1, of the Act it was made unlawful to use a motor vehicle on the road unless there is in force in relation to that user such a policy as the Act requires. Sect. 36 provides in general terms for an insurance in respect of liability for death or bodily injury to any person arising out of the use of the vehicle on the road. Then come provisos, of which (i.) and (ii.) are relevant in this connection. The section says by way of proviso to the general requirement that there should be a policy " Provided that such a policy shall not be required to cover—(i.) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or (ii.) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise." It seems clear that provisos (*b*) and (*c*) of the policy are intended to reproduce and follow the statutory terms. The former of these provisos seems calculated to exclude the necessity of covering claims which would fall within the Workmen's Compensation Acts, though it is true that these Acts would not embrace every case of death or injury to an employee arising out of or in the course of the employment. For instance, there might be such cases where the employee, by reason of the amount of his wages or salary or otherwise, was outside the provisions of the Acts. It may be that for some reason the Legislature thought that these cases were infrequent and might be disregarded. But the second proviso is on a different footing. The general purpose of that statutory provision is to exclude from the compulsory insurance passenger risk in general with the exception in the first place of passengers carried for hire or reward. This is the form of passenger risk which, as already explained, is offered in the respondents' proposal form under the heading of passenger risk. It need not be further discussed here. But the meaning of the other head is that on which the dispute here has turned.

I cannot accept the respondents' contention that "contract of employment" should be construed in the Act as subject to the implied limitation "with the person insured by the policy." Such a departure from the clear language used cannot, I think, be justified. I think the Act is dealing with persons who are on the insured vehicle for sufficient practical or business reasons, and has taken a contract of employment in pursuance of which they are on the vehicle as the adequate criterion of such reasons. But there is no sufficient ground for holding that this criterion should be limited to employees of the insured person. Such employees, if injured or killed, would ordinarily fall under exception (I.), though I am not prepared to say that there might not be in certain events an employee of the assured who could claim as a passenger. But such cases must be rare. The most probable case is where the man killed or injured was on the vehicle in pursuance of a contract not with the owner of the vehicle but with some one else, for instance, with the person whose goods were being carried on the vehicle: thus a commercial vehicle carrying a contractor's or merchant's goods would frequently and perhaps even normally have on it an employee of the goods owner to see to loading or unloading or delivering the goods or caring for them in transit. For these purposes such a man may be carried as a passenger.

The insured person may come under third party liability to such a man who may be described as being in the position of an invitee in the legal sense, vis-à-vis the insured person. A further illustration which comes under the same category is that of an employee or employees of the owner of the goods which are being carried, who go out on the lorry with the goods and return home in the lorry after the goods are delivered. Such employees may properly be regarded as passengers carried in pursuance of a contract with some one other than the insured person. A further illustration is afforded by the facts like those of the present case. Izzard and his mates were being carried, so the arbitrator has found, for purposes of the trade in which the truck was engaged and as an incident of the haulage so far as Druce was concerned. The arbitrator has found that the vehicle was being used for haulage purposes and I see no reason in law for doubting this finding. Similar instances could be multiplied.

I see every practical reason for construing the phrase in the Act " contract of employment " as including a contract with a third party. This does not exclude a contract with the insured person. The words used are apt to include both cases. As a matter of words I think the plain meaning is the true meaning. The words of the statute are general and unlimited. To insert the words " with the insured person " would be to insert words of specific limitation beyond what can be inferred from the general tenor of the Act or policy. If these words had been intended they could and should have been expressed, as was done in the previous paragraph (I.). They are not expressed and in my opinion ought not to be and cannot properly be implied.

In arriving at this conclusion I have been discussing the construction of the statute. But the same reasoning applies to the construction of the policy. The latter is admittedly intended to comply with the former. From this point of view I find no material difference of construction between them, and need not repeat in regard to the policy what I have said in regard to the statute. It is true that the policy is to be construed independently. It might have been so expressed

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as to involve by inadvertence a different interpretation. But I find nothing of the sort.

In my opinion the liability which the appellant seeks to enforce is covered by the policy. I think the appeal should be allowed, the order of the Court of Appeal set aside and the order of MacKinnon J. restored. The respondents will pay the appellant's costs in the Court of Appeal and in this House.

My Lords, I am authorized by my noble and learned friends Lord Russell of Killowen and Lord Roche to say that they concur in the opinion which I have just delivered.

LORD ATKIN. My Lords, I also agree with the opinion of my noble and learned friend Lord Wright, and have nothing to add.

LORD THANKERTON. My Lords, I also concur.

Appeal allowed.

Solicitors for appellant: *L. Bingham & Co.*
Solicitors for respondents: *A. D. Vandamm & Co.*

[HOUSE OF LORDS.]

MOSS' EMPIRES, LIMITED . . . . . APPELLANTS ; H. L. (Sc.)*

AND 1937

INLAND REVENUE COMMISSIONERS . RESPONDENTS. June 1, 24.

Revenue—Income tax—Guarantee by one company to make up deficiency in fixed dividend payable by another company—Payments under guarantee—Whether "annual payments"—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case III., r.* 1 (*a*), *and All Schedules Rules, r.* 21—*Finance Act,* 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 26.

The appellants guaranteed to pay for each of the first five financial years of the D. company, in case its profits should be insufficient to pay a fixed preferential dividend of 7½ per cent. less income tax, such a sum as would enable a dividend at that rate to be paid, and if in any of those five years no profits were made by the D. company the guarantors undertook to pay a sum equivalent to that required to enable the 7½ per cent. dividend (less tax) to be paid. In each of the five years the appellants were called upon to make, and made, payments under their guarantee, the payments varying in amount from year to year according to the sums required by the D. company in order to pay the 7½ per cent. dividend less tax. The appellants were allowed to deduct the sums so paid as a necessary trading expense, and having been assessed under r. 21 of the All Schedules Rules in respect of those sums as being "annual payments," appealed against the assessment:—

Held, that the payments were "annual payments" within r. 21, and the fact that they were contingent and variable in amount did not affect their character as such; and consequently that they were chargeable to tax.

Per Lord Maugham: The word "annual" in the rule must be taken to have the quality of being recurrent or being capable of recurrence, and in this case the payments had this quality.

Decision of the First Division of the Court of Session (reported 1936 S. C. 531) affirmed.

APPEAL from the First Division of the Court of Session. (1)

At a meeting of the Special Commissioners of Income Tax, held on February 28, 1935, the appellants appealed against assessments made upon them under r. 21 of the General Rules applicable to All Schedules of the Income Tax Act, 1918, as amended by the Finance Act, 1927, s. 26, in respect of annual payments not payable or not wholly payable out of profits and gains brought into charge to income tax. The payments in question were made under a guarantee to or on behalf of the shareholders of Dominion Theatre, Ld. The Commissioners, after certain adjustment of the figures, dismissed the appeal and stated a case for the opinion of the Court.

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD MAUGHAM.

(1) 1936 S. C. 531.

The appellants, who were theatre and music-hall proprietors, becoming aware in 1927 that the building of a new theatre in London was in contemplation, decided, along with the Theatre Royal Company, to form a new company in order to get control of certain plays and shows, the new company being the Dominion Theatre Company, Ld. (hereinafter called "the Dominion Company") in which the appellants held a large number of deferred shares. By an agreement dated January 31, 1928, made between the appellants and the Theatre Royal Company (hereinafter called "the guarantors") of the first part, two gentlemen on behalf of themselves and all other holders of the 250,000 ordinary shares of the Dominion Company (hereinafter called "the trustees") of the second part, and the Dominion Company of the third part, the guarantors jointly and severally covenanted with the trustees that in case the profits which might be available for distribution as dividend on the said 250,000 ordinary shares should be insufficient to pay the said fixed dividend at the rate of 7½ per cent. (less income tax at the current rate) for each of the first five financial years of the company ending on January 30, 1933, that they, the guarantors, would make up and pay to the trustees in respect of each and every of such five years a sum equivalent to the amount by which the profits available fell short of the sum required to pay the aforesaid dividend (less tax), or, in case there should be no profits available for distribution in respect of any of such years they would pay to the trustees a sum equivalent to that required to pay the fixed dividend at the rate of 7½ per cent. per annum (less tax) on such ordinary shares for that year; provided that in such last mentioned event the liability of the guarantors should be limited to a sum equivalent to the sum which would have been payable by way of fixed dividend at the rate of 7½ per cent. per annum on the ordinary shares for that year if there had been profits of the company available for distribution in respect thereof.

On February 2, 1928, the Dominion Company issued a prospectus inviting applications for its ordinary and deferred shares, and stating (inter alia) that the ordinary shares conferred the right to a fixed preferential dividend of 7½ per cent., and that in consideration of the allotment to each of them of certain deferred shares the appellants had undertaken jointly and severally to guarantee the fixed dividend of 7½ per cent. (less tax at the current rate) as above stated.

The Dominion Theatre opened on October 3, 1929, but did not meet with much success, and as no profits were available for dividend the guarantors were called upon to pay the dividend (less tax); and in the succeeding years the guarantors were likewise required to contribute to make up the dividend at the rate of 7½ per cent., the sums so paid in each year varying in amount. In computing their profits the actual sums paid by the appellants under the guarantee for the relevant years were allowed as deductions.

For the appellants it was contended (*a*) that the payments under the guarantee were not "annual payments" assessable under Rule 21 of the General Rules of the Income Tax Act, 1918 (1), as amended by s. 26 of the Finance Act, 1927 (2);

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(1) Income Tax Act, 1918, General Rules applicable to Schs. A, B, C, D and E. Rule 21: "(1.) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D, ... not payable, or not wholly payable out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment."

(2) Finance Act, 1927, s. 26: "(1.) Rule 21 of the General Rules shall be amended by the substitution of the following paragraphs for paragraph (2.) thereof:

"(2.) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the Special Commissioners shall assess and charge the payment of which an account is so delivered on that person . . . ."

(*b*) that the payments to the shareholders of the Dominion Company were not made by or through the appellants; (*c*) that the payments of dividend to the shareholders of the Dominion Company were made by the Dominion Company or by the trustees for its shareholders under deduction of tax for which the Dominion Company was accountable; (*d*) that the payments made under the guarantee having been allowed as a trading expense of the appellants were not subject to liability to tax; (*e*) that the appellants did not in point of fact deduct tax from the payments made under the guarantee.

On behalf of the Inland Revenue Commissioners it was contended (*a*) that the sums paid by the appellants under the guarantee were "annual payments"; (*b*) that income tax had in fact been deducted and retained by the appellants in making the payments which represented the net sums remaining after the deduction of income tax; (*c*) that a deduction having been allowed in computing the profits of the appellants chargeable to income tax of the sums paid under the guarantee, the payments were not made out of profits or gains brought into charge to tax notwithstanding the fact that in certain years the balance of profits charged to tax exceeded the payments under the guarantee; (*d*) that the appellants were correctly assessed under r. 21 of the General Rules applicable to All Schedules of the Income Tax Act, 1918, in respect of the payments under the guarantee.

The Commissioners having decided in favour of the Crown, the appellants required the Commissioners to state, and they stated, a case for the opinion of the Court, in which the questions of law were (1.) whether the sums payable under the guarantee by the appellants were annual payments from which income tax was deductible, and if so (2.) whether the appellants were correctly assessed under r. 21 of the said General Rules as amended by s. 26 of the Finance Act, 1927.

The First Division of the Court of Session (Lord Moncrieff dissenting) held that the payment in question was an "annual payment" within the meaning of Sch. D, Case III., r. 1 (*a*) and r. 21 of the All Schedule Rules; and that the appellants were properly assessed.

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Moss' Empires, Ld. v. Inland Revenue Commissioners.

The appellants appealed to this House.

1937. June 1. *Latter K.C.* and *Sherwood Calver* (the second of the Scots Bar) for the appellants. A payment by one company which is made only on default being made by another company and which varies from year to year cannot rightly be described as an " annual payment " within r. 21. Suppose that there had been a deficiency in one year only, a payment in respect of that one year could certainly not be so described. The character of being annual is entirely absent from these payments. The shareholders of the Dominion Company expected to get a dividend ; they did not get it ; they received something in compensation, and the mere fact that the amount was measured by what would have been a dividend does not alter its legal character. In *Oswald* v. *Kirkcaldy Magistrates* (1) it appeared that the magistrates of a burgh constructed a sewer through the lands of a proprietor, under an agreement by which the latter undertook that, until the assessable rental from the district affected should yield, in respect of the sewer rate, a return equal to 5 per cent. on the cost of the sewer, he would annually make up the deficiency. There the opinion was expressed that the payments made under the agreement were not " annual payments," and accordingly were not subject to deduction of income tax. [*Neumann* v. *Inland Revenue Commissioners* (2) was referred to.]

Wardlaw Burnet K.C., *Reginald Hills*, and *T. B. Simpson* (the first and third of the Scots Bar) for the respondents. The obligation undertaken by the guarantors was to " make up and pay to the trustees in respect of each and every year of such five years a sum equivalent to the amount by which the profits available as aforesaid shall fall short of the sum required to pay the aforesaid dividend (less tax) for any year during the said period of five years." That is an obligation which involves an " annual payment " within the meaning of r. 21 and therefore is chargeable with tax under Sch. D, Case III., r. 1 (*a*). In *Renfrew Magistrates* v. *Inland*

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(1) 1919 S. C. 147.

(2) [1934] A. C. 215.

Revenue Commissioners (1) an agreement was made between the Clyde Trustees and the Renfrew Town Council whereby the former undertook to spend a large sum upon the construction of docks in the burgh within a certain period. The trustees did not construct the docks but entered into an agreement with the burgh under which they were to pay 2000*l*. a year until they should complete the docks, in full compensation for the delay in doing so. This sum was annually paid to the burgh in full without deduction of tax and the payment was allowed in computing the trustees' profits for assessment. It was held that the sums received by the burgh were " annual payments " made in virtue of a contractual obligation. That decision is exactly in point here where the facts are parallel.

Latter K.C. replied.

The House took time for consideration.

June 24. Lord Atkin. My Lords, I have had the advantage of reading in advance the opinions about to be delivered by my noble and learned friends Lord Macmillan and Lord Maugham. I entirely agree with them and have nothing to add.

Lord Thankerton. My Lords, I have had the same privilege of considering those opinions, in both of which I concur.

Lord Macmillan. The question is whether certain payments made by the appellants in fulfilment of an obligation undertaken by them in an agreement dated January 31, 1928, were " annual payments charged with tax under Schedule D," within the meaning of para. (1.) of r. 21 of the General Rules applicable to All Schedules of the Income Tax Act, 1918. If so, then it was the duty of the appellants, under the rule, on making the payments to deduct therefrom income tax at the current rate and to account to the Commissioners of Inland Revenue for the tax so deducted.

The parties to the agreement in question were (1.) the appellants and Theatre Royal, Drury Lane, Ld., thereinafter

(1) 1934 S. C. 468.

called "the guarantors"; (2.) two named gentlemen on behalf of themselves and all other holders of ordinary shares in Dominion Theatre, Ld., thereinafter called "the trustees"; and (3.) Dominion Theatre, Ld., thereinafter called "the company." It is unnecessary to detail the circumstances which led up to the agreement or the business reasons which induced the parties to enter into it. In the recitals it is stated that the holders of the ordinary shares of Dominion Theatre, Ld., were entitled to receive a fixed preferential dividend at the rate of 7½ per cent. per annum on the capital paid up thereon out of the profits of the company available for distribution and determined to be distributed by way of dividend. The purpose of the agreement was to ensure the payment of this return on the ordinary shares for five years, and with this object the appellants and Theatre Royal, Drury Lane, Ld., jointly and severally guaranteed and covenanted to and with the trustees, as trustees for and on behalf of the holders for the time being and from time to time of the said 250,000 ordinary shares of the company, "that in case the profits which may be available for distribution as dividend as aforesaid on the said 250,000 ordinary shares of the company shall be insufficient to pay the said fixed dividend at the rate of 7½ per cent. (less income tax at the current rate) for each of the first five financial years of the company ending on January 30, 1933, the guarantors will make up and pay to the trustees in respect of each and every of such five years a sum equivalent to the amount by which the profits available as aforesaid shall fall short of the sum required to pay the aforesaid dividend (less tax) for any year during the said period of five years; or in case there shall be no profits available for distribution as aforesaid in respect of any of such years, then the guarantors will pay to the trustees a sum equivalent to the sum required to pay the fixed dividend at the rate of 7½ per cent. per annum (less tax) on such ordinary shares for that year. Provided and it is hereby declared that in such last-mentioned event the liability of the guarantors shall be limited to a sum equivalent to the sum which would have been payable by way of fixed dividend at the rate of 7½ per cent. per annum on the ordinary shares for that year if there had been profits of the company available for distribution in respect thereof."

Clauses followed providing that all sums paid by the guarantors should be distributed by the trustees or by the company amongst the ordinary shareholders in the same proportions as if they were distributions by way of fixed dividend; that any sums so distributed were to be deemed to be pro tanto payment and satisfaction of the 7½ per cent. dividend; and that in case in any year the profits available for distribution should not be sufficient to pay the 7½ per cent. dividend, the company should notify the guarantors of the sum "required to make up the said fixed dividend to 7½ per cent. per annum (less tax) or to pay the said fixed dividend."

In each of the five years covered by the agreement the appellants were called upon to make payments under their obligation. In some of the years the company made no profits, in others the profits made were insufficient to pay the 7½ per cent. dividend in full. The sums so paid by the appellants (as now adjusted) were as follows (shillings and pence discarded):

	l.
1929	3322
1930	7438
1931	1655
1932	6797
1933	7031

It is to be noted that the sum which the appellants paid in each case was their share of the amount (less tax) required for the payment of the 7½ per cent. Thus in the last instance, where the company made no profits, the sum of 7031*l.* which the appellants were called upon to pay was calculated as follows:

	l.	*s.*
250,000 ordinary shares at 7½ per cent. .	18,750	0
Less tax at 5*s.* in the *l.* . . .	4,687	10
	14,062	10
Whereof one-half	7,031	5

In each of the five years the appellants, in computing the amount of their profits and gains for tax purposes, were permitted to deduct the sum paid under the agreement as being a disbursement or expense wholly and exclusively laid out or expended for the purposes of their trade. Consequently the payments were not "payable out of profits or gains brought into charge," and thus satisfied one of the conditions of the applicability of r. 21.

The sums paid by the appellants and their co-obligants were duly utilized in paying to the ordinary shareholders a return of 7½ per cent. (less tax) on their shares. In at least two instances dividend warrants in ordinary form were sent out by the company to the shareholders with the usual certificate that income tax had been deducted and had been or would be duly accounted for to the proper officer.

For the five fiscal years 1928–29 and 1930–31 to 1933–34 assessments were made in respect of the sums paid by the appellants under the agreement. The appellants appealed to the Special Commissioners, who affirmed the assessments, and at the appellants' request stated for the opinion of the Court the two following questions:

"(1.) Whether the sums payable under the said guarantee by the appellant company were annual payments from which income tax was deductible? and if so

(2.) Whether the appellant company was correctly assessed under rule 21 of the said General Rules as amended by the Finance Act, 1927, section 26?"

The First Division of the Court of Session (Lord Moncrieff dissenting) answered both questions in the affirmative.

At your Lordships' Bar it was argued for the appellants that the payments were not annual payments inasmuch as they were casual, independent, not necessarily recurrent, and throughout subject to a contingency. This argument commended itself to Lord Moncrieff, but I am unable to accept it. There was a continuing obligation extending over each and all of the five years to make a payment to the trustees for the shareholders in the event of the company earning no profits or insufficient profits. The fact that the payments were contingent and variable in amount does not affect the character of the payments as annual payments. Rule 21 is not primarily a charging section, but is part of the machinery of collection. The charging enactment is to be found in r. 1 of Case III., Sch. D, whereby tax is imposed on "any interest of money whether yearly or otherwise or any annuity or any other annual payment . . . . payable . . . . as a personal debt or obligation by virtue of any contract." I am of opinion that the payments in question fall within these words.

Mr. Latter sought to argue (contrary to the admission recorded in the Lord President's opinion) that the sums paid were not payments of income inasmuch as they were payments made in lieu of income or by way of compensation for not receiving income, but I am quite unable to accept this view. The payments were indisputably income in the hands of the recipients.

There was some discussion as to the correct interpretation of the obligation undertaken by the appellants. Was it to pay one-half of the gross sum required to pay or make up the dividend with the right (and duty) to deduct the tax when making payment? Or was it to pay one-half of the net sum required to pay or make up the dividend after deduction of tax? To take the last year as an illustration: Was the obligation to pay one-half of 18,750*l.* with the right to deduct tax or was the obligation to pay one-half of 14,062*l.*? It is unnecessary to determine this point, for whichever be the true reading the appellants were, in my opinion, bound when making payment on either basis to deduct and account for tax. It may, however, be pointed out that on the first basis the sums allowed to be deducted by the appellants as disbursements, as also the sums assessed, would have been different from those actually allowed and assessed; while on the second basis the agreement would not achieve its purpose; for the payments, if the appellants retained out of them the tax payable, would not be sufficient to put the company in funds to make a distribution of 7½ per cent. (less tax) among the shareholders.

Being of opinion, as I am, that the payments in question were "annual payments charged with tax under Schedule D," and it being admitted that they were not "payable out of profits or gains brought into charge," I move your Lordships to affirm the interlocutor of the First Division of the Court of Session and dismiss the appeal with costs.

Lord Wright. My Lords, I agree with the opinion which has just been delivered by my noble and learned friend Lord Macmillan. I have also had the advantage of reading the opinion about to be delivered by my noble and learned friend Lord Maugham, in which I also concur.

Lord Maugham. I have had the advantage of reading the opinion of my noble and learned friend, Lord Macmillan, with which I entirely concur. I will only add for myself some brief observations. The sole difficulty in the case, as I see it, is the question whether sums paid under the agreement of January 31, 1928, were annual payments within the language of r. 21 of the General Rules of the Income Tax Act, 1918. The sentence runs: "Upon payment of any interest of money, annuity or other annual payment, etc."; and the charging section is to be found in Sch. D, 1 (*b*), taken with the words of r. 1 applicable to Case III. of that Schedule as stated by his Lordship.

It is, I think, to be noted that we are not concerned here with the case of annual profits or gains arising from a trade, as to which the decision in *Martin* v. *Lowry* (1) would be decisive to show that in that context "annual" means "in any one year." In r. 21 "annual" must be taken to have, like interest on money or an annuity, the quality of being recurrent or being capable of recurrence. The payments we are concerned with were to continue for five years, subject to their being required to make up the guaranteed annual dividend, and were plainly payments intended to supplement so far as necessary the income of the recipients during each of the years in question. In these circumstances I am of opinion that they had the necessary quality of recurrence and are within the

(1) [1927] A. C. 312.

terms of r. 21. In so deciding I apprehend that your Lordships are not travelling in any way beyond the existing decisions with regard to "annual payments" in that rule. On the other points I cannot usefully add anything to what has fallen from my noble and learned friend.

Appeal dismissed.

Solicitors for appellants: *Burton & Ramsden, for Allan, Dawson, Simpson & Hampton, W.S., Edinburgh.*

Solicitors for respondents: *Solicitor of Inland Revenue, London, for Solicitor of Inland Revenue, Edinburgh.*

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otor Trade Assn. v.
lvadori.
[1949] 1 Ch. 556

[HOUSE OF LORDS.]

H. L. (E.)[*]
1937
April 9, 12, 13; June 3.

THORNE . . . . Appellant;

AND

MOTOR TRADE ASSOCIATION . . . Respondents.

Trade Union—Association of motor manufacturers—Prohibition of sales at other than list prices—Enforcement of rule by Stop List unless a money payment made—Whether demand for payment as an alternative to placing person on Stop List a demand with " menaces " without reasonable or probable cause—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 29, *sub-s.* 1 (*i*).

A trade association which by its constitution is entitled to put on a Stop List the name of a member or other person who has infringed its rule forbidding the sale of articles at other than the list prices relevant thereto, may, instead of putting the name of that member or other person on the Stop List, require him, in furtherance of its trade interests, to pay a sum of money within reasonable limits. To ask for such payment in those circumstances is not in itself a demand of money with menaces and without reasonable or probable cause within s. 29, sub-s. 1 (*i*), of the Larceny Act, 1916:—

Held, that in a criminal charge under s. 29, sub-s. 1, of the Larceny Act, 1916, the absence of reasonable or probable cause is a question of fact for the jury; but, if the cause is reasonably capable of being associated with the promotion of lawful business interests, the judge should not allow the case to go to the jury if there is no evidence of the accused's intention going beyond such lawful business interests.

Rex v *Denyer* [1926] 2 K. B. 258 disapproved.

Hardie & Lane v. *Chilton* [1928] 2 K. B. 306 was correctly decided, but certain propositions were too widely stated by Scrutton L.J.

Rex v. *Dymond* [1920] 2 K. B. 260 considered.

Decision of Court of Appeal affirmed.

Appeal from an order of the Court of Appeal.

The plaintiff, who was a member of the defendant Association, sued it and its secretary, claiming a declaration and an injunction. The Association, a certified trade union, had among its Rules the following: "12. (1.) No member of the Association shall offer for sale, or sell or agree to sell any new trade goods at a price other than the list price relevant thereto" ; and any member who allowed a discount save that permitted by a manufacturer's or concessionaire's agreement, or sold at a reduced price any trade goods as shop-soiled or demonstration models without the special consent of the manufacturer or concessionaire, or allowed any credit or made any payment whereby the actual price paid for any trade goods was other than the relevant list price, was to be deemed to have committed a breach of sub-r. 1 above set out. The Association had a list known as "The Stop List" in a form set out in the appendix to the Rules as follows :

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[*] *Present:* Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, and Lord Roche.

"Stop List as on . . . . 19...

"This Stop List is issued as part of the Association's trade protection policy only, and has no reference to any other matter, and neither casts nor implies any reflection on the conduct, trade, or standing of any person named therein. In pursuance of its trade protection policy, the Motor Trade Association issues the subjoined Stop List.

"Until further notice (and except under any contract already existing which the supplier is, by law, obliged to fulfil) the following persons are not to be supplied directly or indirectly with any trade goods. . . . ."

On April 9, 1936, the Association adopted as part of its Rules the following : "14. (1.) No member of the Association shall supply, directly or indirectly, any trade goods . . . . to, or have trade relations in respect of any trade goods . . . . with, any person whose name is placed upon the Stop List except under a contract already existing which the member is, by law, obliged to fulfil." Rule 15, sub-r. 1 : "In case of a breach by any member of," (inter alia), r. 14, sub-r. 1, "or in case of conduct on the part of any other person which in the case of a member would constitute a breach of the said Rules, the Council or Price Protection Committees shall have power to place the name of such member or person on the Stop List or to make an order that the name of such member or person be placed upon the Stop List, unless within twenty-one days such member or person pay to the Association a fine within limits to be laid down by the Council and give such undertaking as the Council or Price Protection Committees may demand."

Rule 17, sub-r. 1, provided that any alleged breach of (inter alia) r. 14, sub-r. 1, should be investigated by a Price Protection Committee selected from a panel approved by the Council.

Rule 19, sub-r. 3: "The finding of the Committee shall be by a majority vote . . . . and shall be announced after the Committee have reached a decision, and thereafter shall be communicated in writing to the person charged, together, where the charge is found proved, with notice of the penalty imposed"; sub-r. 4: "Where the Committee finds that the charge is proved it shall impose such penalty provided under Rule 15 as is thought just."

By his statement of claim the plaintiff alleged that the power referred to in r. 15, sub-r. 1, was illegal in that any such order, if made, would be illegal, or alternatively would necessarily require an illegal act to be done. Alternatively he said that the Association had no power to adopt r. 15, sub-r. 1, in so far as it purported to confer the said power, and the resolution of the meeting adopting the same was ultra vires, void and of no effect.

The plaintiff claimed (1.) a declaration that so much of what purported to be r. 15, sub-r. 1, as provided that the Council or Price Protection Committee should have power to make an order that the name of such member or person be placed upon the Stop List unless within twenty-one days he paid to the Association a fine within limits to be laid down by the Council was illegal and/or ultra vires having regard to the status and objects of the Association; and (2.) an injunction restraining the Association and the secretary from acting on any order under or in virtue of the assumed power of the Council to place the name of such member or person on the Stop List unless within twenty-one days he paid to the Association a fine within limits to be laid down by the Council.

By their defence the defendants denied that the power given by r. 15, sub-r. 1, was illegal, or that the Association had no power to adopt r. 15, or that it was ultra vires, void and of no effect.

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The action was tried by MacKinnon J., who in the course of his judgment said: This is a case which has been candidly stated to be a friendly action between the plaintiff and the defendants, and it has been stated with equal candour that the proceedings have been brought to determine the difference between the Court of Criminal Appeal in *Rex* v. *Denyer* (1) and the Court of Appeal in *Hardie & Lane* v *Chilton.* (2) In these circumstances he said that he was bound by the decision of the Court of Appeal in *Hardie & Lane* v. *Chilton* (2), and was therefore relieved from the task of attempting to form any opinion on the question whether the reasoning of the Court in that case or that of the Court of Criminal Appeal in *Rex* v. *Denyer* (1) was right. The result was that the action failed and there would be judgment for the defendants.

On appeal, the Court of Appeal (Greer and Greene L.JJ. and Talbot J.) also took the view that the case was covered by the decision in *Hardie & Lane* v. *Chilton* (2) and consequently dismissed the appeal.

The plaintiff appealed to this House, and on his death the appeal was continued in the name of his widow as his executrix.

1937. April 9. *Laski K.C.* and *Richard Hurst* for the appellant. The question is whether the decision in *Rex* v. *Denyer* (1), or that in *Hardie & Lane* v. *Chilton* (2), is correct in point of law. In the former the Court of Criminal Appeal decided that a letter written by a servant of the Motor Trade Association requiring, as an alternative to being placed on the Stop List, payment of a sum of money by a garage proprietor who was not a member of the Association for having offered to sell a car below list price, was a demand of money with menaces within s. 29, sub-s. 1 (*i.*), of the Larceny Act, 1916. (3) In *Hardie &*

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(1) [1926] 2 K. B. 258.

(2) [1928] 2 K. B. 306.

(3) Larceny Act, 1916, s. 29, sub-s. 1: "Every person who—(1.) utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing . . . . shall be guilty of felony . . . ."

Lane v. *Chilton* (1), the Court of Appeal held that a trade association, which by its constitution was entitled to put on a Stop List the name of a person who had infringed its rule forbidding the sale of articles at other than fixed prices, might, instead of doing this, lawfully adopt the more lenient course of asking the person to make, and for it to accept, a money payment by way of compromise. *Rex* v. *Denyer* (2) was there disapproved. Shortly afterwards, the Lord Chief Justice referring to the decision of the Court of Appeal said (3): "It may be well, therefore, to make it clear, for the purposes of the administration of the criminal law, that unless and until the decision in *Rex* v. *Denyer* (2) is reversed by the only competent tribunal, it is binding upon and will be enforced by this Court against any person or persons offending in like manner." In view of that conflict of judicial opinion the parties wish a definite ruling on the point. In *Ware and De Freville* v. *Motor Trade Association* (4), it was held that the publication of a member's name in a Stop List was not unlawful inasmuch it was done in the bona fide protection of trade interests, but in that case the effect of the provisions of the Larceny Act was not discussed. In *Sorrell* v. *Smith* (5), Lord Dunedin said (6): that "even although the dominating motive in a certain course of action may be the furtherance of your own business or your own interests, as you conceive those interests to lie, you are not entitled to interfere with another man's method of gaining his living by illegal means, and illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy where they would not have been illegal if done by a single individual." Those observations have a great relevance in considering the word "menaces." In the same case Lord Buckmaster said (7): that *Quinn* v. *Leathem* (8) established (inter alia) that "acts done in pursuance of a conspiracy having for its real purpose the

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(1) [1928] 2 K. B. 306.
(2) [1926] 2 K. B. 258.
(3) (1928) 20 Cr. App. R. 185, 186.
(4) [1921] 3 K. B. 40.
(5) [1925] A. C. 700.
(6) Ibid. 719.
(7) Ibid. 744.
(8) [1901] A. C. 495.

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injury of a man in his trade or calling are an actionable wrong." In this case we say that in no circumstances can r. 15 of the respondent Association be operated legally inasmuch as it states a predetermined resolution to put the alleged offending person's name on the Stop List unless he pays a sum of money; that is, the imposition of a fine for a breach of the rule. To say to a man, "If you do not pay I will put you on the Stop List and thereby deprive you of your commercial life," is a menace within the meaning of the section of the Larceny Act, and such a menace which the ordinary person is powerless to resist. The word "menace" is to be construed in a wide sense: see per Lord Russell of Killowen C.J. in *Reg.* v. *Tomlinson* (1); and per Lord Reading C.J. in *Rex* v. *Boyle.* (2)

[LORD THANKERTON. Under s. 29, sub-s. 1, of the Larceny Act, 1916, the gravamen of the offence is demanding money without reasonable cause.]

It cannot be reasonable to make a demand the refusal to comply with which involves commercial extinction. In *Reg.* v. *Smith* (3), Wilde C.J. said that the object of the Legislature in such legislation obviously was to prevent money being extorted from individuals by working upon their terrors—language apt to describe the threat held over the present appellant: see also to the same effect *Reg.* v. *Walton and Ogden* (4) and *Reg.* v. *Hamilton.* (5) It is no defence for a person to set up that he thought that he had reasonable and probable cause for making the demand: *Rex* v. *Dymond.* (6)

[LORD RUSSELL OF KILLOWEN. In the ordinary case where a person menaces another, for example, where he makes a threat that unless a sum of money is paid there will be a disclosure of something, the object is to obtain money. Here the object is to ensure compliance with the rules.]

Rule 15 states the position as it was in *Rex* v. *Denyer* (7), and we base our case on that decision.

(1) [1895] 1 Q. B. 706.
(2) [1914] 3 K. B. 339.
(3) (1850) 4 Cox C. C. 42.
(4) (1863) 9 Cox C. C. 268.
(5) (1843) 1 C. & K. 212.
(6) [1920] 2 K. B. 260.
(7) [1926] 2 K. B. 258.

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Sir William Jowitt K.C., *H. Phillip Levy* and *P. I. V. Rippon* for the respondents. While we invite the House to say that *Rex* v. *Denyer* (1) was wrongly decided and that the decision in *Hardie & Lane* v. *Chilton* (2) was rightly decided we do not contend that the reasoning of Scrutton L.J. in the latter case was correct in its entirety. To say: " I have a legal right to do something, therefore I can demand money as the price of not doing it " states the law too broadly. Professor Goodhart in the chapter on " Blackmail and Consideration in Contract " in his " Essays in Jurisprudence and the Common Law " discusses the two decisions and points out that there are moral and immoral liberties and that the surrender of the latter will not constitute valid consideration, and, therefore, cannot be reasonable and probable cause for demanding money. We are not however concerned here with immoral liberties. While criticizing Scrutton L.J.'s wide proposition, Professor Goodhart considers that the decision was right notwithstanding. Romer J. correctly stated the position in *Hardie & Lane* v. *Chilton* (2), when he said that there was no evidence from which it could be inferred that there was an absence of reasonable or probable cause for making the demand. To come within s. 29 of the Larceny Act there must be mens rea, and so long as the demand on the offending member of the Association or other person is for payment of a sum of money as an alternative to being placed on the Stop List, and the demand is made in the genuine protection of the Association's policy, and not for any ulterior purpose, there is no mens rea. The state of mind of the person making a demand is to be ascertained: *Reg.* v. *Miard.* (3) For a person who has been libelled to say to his defamer, " Pay me a sum of money, or I will take proceedings against you " would certainly be permissible.

Laski K.C. replied.

The House took time for consideration.

(1) [1926] 2 K. B. 258.
(2) [1928] 2 K. B. 306.
(3) (1844) 1 Cox C. C. 22.

June 3. The following opinions were read :—

LORD ATKIN. My Lords, this is an appeal from an order of the Court of Appeal affirming a judgment in favour of the defendants given by MacKinnon J. on April 29, 1936. The plaintiff is a member of the Motor Trade Association and the action was brought for a declaration that "so much of rule 15 (I.) of the defendant Association as provides that the Council and Price Protection Committee shall have power . . . . to make an order that the name of such member or person be placed upon the Stop List unless within twenty-one days such member or person pay to the Association a fine within limits to be laid down by the Council" is illegal and/or ultra vires having regard to the status and objects of the Association, and for an injunction to restrain the defendants from acting on the power so given. The action is in the nature of a friendly proceeding brought to determine a very practical difficulty that has arisen in the affairs of the Association by reason of two decisions of the Courts which appeared to conflict. In *Rex* v. *Denyer* (1) in the Court of Criminal Appeal, one of the officials of the Association who had acted under a similar rule had been convicted under s. 29, sub-s. 1, of the Larceny Act, 1916, of uttering a letter demanding money with menaces and without any reasonable or probable cause, and his conviction was upheld. In *Hardie & Lane Co.* v. *Chilton* (2) the plaintiffs sought to recover back money which had been demanded from them in similar circumstances to those in *Rex* v. *Denyer.* (1) The Court of Appeal disagreed with the decision in *Rex* v. *Denyer* (1) and entered judgment for the defendant. It is not surprising, therefore, that the members of the Association should desire to know where they stand. In the Courts below there was no argument, as the case was properly treated as being governed by the previous decision of the Court of Appeal. Before your Lordships the case was fully argued and though it is probable that the appellant will suffer no depression of spirits if the appeal be dismissed, yet every relevant consideration was put

(1) [1926] 2 K. B. 258.

(2) [1928] 2 K. B. 306.

before this House. No evidence was called at the trial, though your Lordships asked for and received copies of the resolutions of the Association indicating how the rules are administered at present in regard to the limits of the amounts demanded. For the purposes of the case it is necessary to read rr. 2, 3, 11, 12, 13 and Appendix 1, 14, 15, 16, 17, 18, 19, 20, 21, 22, 26.

The question appears to be whether the effect of r. 15, sub-r. 1, is such that if the Council or Price Protection Committee make an order that the name of a member or non-member be placed on the Stop List, unless within twenty-one days such member or person pay to the Association a fine as prescribed by the Council and give the required undertaking, the person who writes on behalf of the Association to demand the fine necessarily commits the offence constituted by s. 29, sub-s. 1, of the Larceny Act, or s. 31. This House allowed an amendment to raise the effect of the last mentioned section. If the rule can be administered without a criminal act, the present plaintiff must in my opinion fail: for it must not be imputed to the Association that they would commit or authorize a crime when the powers given to them are capable of being exercised lawfully.

Is it true then that if the Council as an alternative to putting the name of a person on the Stop List require him to pay a limited sum and to give an undertaking to comply with the terms of the rules and write to the person to that effect, their agent is necessarily guilty of demanding money with menaces without reasonable or probable cause?

To my mind the key to the situation is to be found in the fact that to put a man's name on a Stop List in such circumstances as the present is not a wrongful act: does not infringe any right of the person so pilloried. This seems to have been conclusively decided by *Ware & De Freville* v. *Motor Trade Association* (1), which was approved in this House in *Sorrell* v. *Smith*. (2) It is an act done in lawful furtherance of business interests, and though done in

(1) [1921] 3 K. B. 40.
(2) [1925] A. C. 700.

combination is done without any express intent to injure the person whose name is published.

Now when the Association write to what I will call an offender announcing that they will put him on the Stop List unless he pays a sum of money I think that several of the elements of the offence under s. 29, sub-s. 1, exist. They seem to me to "menace" him with the Stop List. If the matter came to us for decision for the first time I think there would be something to be said for a construction of "menace" which connoted threats of violence and injury to person or property, and a contrast might be made between "menaces" and "threats" as used in other sections of the various statutes. But in several cases it has been decided that "menace" in this subsection and its predecessors is simply equivalent to threat: *Reg.* v. *Tomlinson* (1); *Rex* v. *Boyle and Merchant.* (2) The Larceny Act, 1916, was passed after these decisions and I think they must be accepted: though possibly some of the expressions in some of the judgments are open to criticism. In *Ware & De Freville* v. *Motor Trade Association* (3) and again in *Hardie & Lane* v. *Chilton* (4) Scrutton L.J. appeared to indicate that if a man merely threatened to do that which he had a right to do the threat could not be a menace within the Act. With great respect this seems to me to be plainly wrong: and I entirely agree with the criticism of this proposition made by the Lord Chief Justice in *Rex* v. *Denyer.* (5) The ordinary blackmailer normally threatens to do what he has a perfect right to do—namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened. Often indeed he has not only the right but also the duty to make the disclosure, as of a felony, to the competent authorities. What he has to justify is not the threat, but the demand of money. The gravamen of the charge is the demand without reasonable or probable cause: and I cannot think that the mere fact that the threat is to do something a person is entitled to do either causes the threat not to be a " menace " within the Act or in itself provides a reasonable or probable cause for the demand. It could not be contended that in writing such a letter as suggested the Association would not be demanding money. It would be proved, therefore, that they uttered a letter demanding with menaces money : and the only question is whether the demand would be without reasonable or probable cause. It is here that I am unable to agree with the decision in *Denyer's* case. (1) It appears to me that if a man may lawfully, in the furtherance of business interests, do acts which will seriously injure another in his business he may also lawfully, if he is still acting in furtherance of his business interests, offer that other to accept a sum of money as an alternative to doing the injurious acts. He must no doubt be acting not for the mere purpose of putting money in his pocket, but for some legitimate purpose other than the mere acquisition of money. In the present case the rules empower the Council and the Committees to demand sums " within limits " as an alternative to the Stop List. It is obvious that a reasonable construction of the rules leads to the inference that the intention is to deter persons in the trade from violating recognized conventions as to maintaining list prices and the like : to give the Council power to preclude all traders from commerce with the offender : but to allow the Council to mitigate the grave penalty of " Stop List " by substituting a money payment and an undertaking not to offend again. If the Council bona fide exercised this power with the bona fide intention only of carrying out this trade policy, in my opinion they would not be demanding the payment without reasonable and probable cause. It is impossible to assume that the rules must necessarily be abused : and as the power given can be exercised lawfully, it cannot be said that they are ultra vires. By consent of the parties resolutions of the Council were produced indicating what appeared to be reasonable limits for the sums to be demanded varying as the supposed offence was a first or second offence and so on. I do not think that the actual limits fixed should determine the question as to the validity of rules giving power to demand sums within limits to be fixed. It is plain that these rules and any similar rules of any other association in any other trade are capable of being abused: and if so nothing in this decision will prevent offenders from being subject to the criminal law.

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(1) [1895] 1 Q. B. 706.
(2) [1914] 3 K. B. 339.
(3) [1921] 3 K. B. 40.
(4) [1928] 2 K. B. 306.
(5) [1926] 2 K. B. 258.

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(1) [1926] 2 K. B. 258.

But if the rules were genuinely enforced I am satisfied that there would not be, as in my opinion in *Denyer's* case (1) there was not, any evidence of an absence of reasonable or probable cause. It follows from what I have said that I cannot agree with the judgment in *Denyer's* case (1) that there was no nexus or relationship between a right to put the name of Mr. Read (the alleged offender) upon the Stop List, and a right to demand from him 257*l.* as the price of abstaining from that course. I think that the final passage from the summing-up of Talbot J. cited in the judgment of the Court of Criminal Appeal was wrong. It is the excessive width of the proposition there stated that seems to me to constitute the flaw in the reasoning in that case throughout. I think that the absence of reasonable or probable cause is in a criminal charge under this subsection a question of fact for the jury. But if the cause is reasonably capable of being associated with the promotion of lawful business interests the judge should not allow the case to go to the jury if there is no evidence of the accused's intention going beyond such lawful business interests.

I only wish to add a word as to the case of *Rex* v. *Dymond* (2) referred to in the argument which may have a bearing on cases to be tried under this section. In that case the prisoner was charged under this subsection. Her defence was that she had been indecently assaulted by the prosecutor and that she thought she had a right to demand money from him in compensation. The learned judge at assizes, Darling J., had refused to allow evidence to be called either as to the fact or as to her belief. The argument for the Crown was that an indecent assault differed from a common assault, and that even if the accused woman had been assaulted it would

(1) [1926] 2 K. B. 258.

(2) [1920] 2 K. B. 260.

not justify a claim for compensation and that her belief that it would was irrelevant. The Court agreed with this contention: and I express no opinion upon it. But language was used in the judgment which seemed to indicate that even if the mistake were as to a fact which would have constituted a reasonable cause such a mistake would be irrelevant; in other words there must be in fact a cause not merely a genuine belief in a cause. This seems to me incautiously expressed: and I do not think that doubt should exist upon a well established proposition in criminal law that normally a genuine belief in the existence of facts as apart from law, which if they existed would constitute a defence, is itself a sufficient defence.

I think this appeal should be dismissed with costs.

LORD THANKERTON. My Lords, I find myself in agreement with the opinions of my noble and learned friends, which I have had the privilege of considering, and I will only add a few observations, as the appeal raises an apparent conflict of view between the Court of Criminal Appeal and the Court of Appeal in the criminal case of *Rex* v. *Denyer* (1) and the civil case of *Hardie & Lane* v. *Chilton.* (2)

The appellant seeks a declaration that r. 15, sub-r. 1, of the rules of the Association is illegal and/or ultra vires in so far as it empowers the Council or Price Protection Committee, as an alternative to placing the offending person—whether a member or not—on the "Stop List," to make an order that the name of such person be placed on the Stop List, unless within twenty-one days he pays to the Association a fine to be fixed as provided for.

The only ground submitted by the appellant was that the pronouncing of such an order would necessarily constitute a felony within the meaning of s. 29, sub-s. 1, of the Larceny Act, 1916. In other words, the appellant undertakes to satisfy your Lordships that no such order could be made without committing a felony. I agree with your Lordships that the appellant has failed to do so, but it does not follow

(1) [1926] 2 K. B. 258.

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from the refusal to give the declaration sought by the appellant that such order could not be made under such circumstances as might bring it within s. 29, sub-s. 1, of the Act. In the view that I take, it will be sufficient to consider whether any such order must necessarily be made " without any reasonable or probable cause," for, if it need not be so made, it will be outwith the sub-section, and it will be unnecessary to consider whether in any other respects it need not fall within the terms of the sub-section.

As has been fully stated by my noble and learned friends, it is now settled that the use of the " Stop List " by an association in good faith and in furtherance or protection of its legitimate trade interests is legal: *Ware & De Freville* v. *Motor Trade Association* (1) approved of in *Sorrell* v. *Smith.* (2) In the present case, there can be no doubt that the offer to receive payment of a fine as an alternative to the exercise of that right is intended to be more favourable to the offending person, and that the cause of the offer is the existing right of the Association to place such person on the " Stop List," and, in my opinion, that existing right, in the absence of special circumstances, affords reasonable and probable cause for the alternative offered.

I therefore agree that the decision of the Court of Appeal in *Hardie & Lane* v. *Chilton* (3) was correct, and that the decision in *Denyer's* case (4) so far as in principle it conflicts therewith, is incorrect. The facts in the latter case are not sufficiently disclosed in the report to enable me to discuss the correctness of the decision in that particular case, even if it were necessary to do so.

For these reasons I agree that the appeal should be dismissed.

LORD RUSSELL OF KILLOWEN. My Lords, the question for our decision is whether so much of r. 15, sub-r. 1, as gives power to the Council or Price Protection Committees to order that the name of a member or any other person be placed upon

(1) [1921] 3 K. B. 40.
(2) [1925] A. C. 700.
(3) [1928] 2 K. B. 306.
(4) [1926] 2 K. B. 258.

the Stop List unless within twenty-one days he pay to the Association a fine within limits to be laid down by the Council and give such undertaking as the Council or Price Protection Committees may demand is illegal; the ground for the alleged illegality being that an exercise of that power must necessarily involve the commission of the felony described in s. 29, sub-s. 1 (*i.*), of the Larceny Act, 1916. That particular felony is thus described: "Every person who utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without reasonable or probable cause, any property or valuable thing . . . . shall be guilty of felony, and on conviction thereof liable to penal servitude for life, ..."

The power of putting names, whether of members or non-members, on the Stop List, if exercised bona fide for the promotion of the trade interests of members, was held to be lawful by the Court of Appeal in *Ware & De Freville* v. *Motor Trade Association* (1), a decision subsequently approved by your Lordships' House in *Sorrell* v. *Smith.* (2) But requesting the payment of a fine as part of an offered alternative to inclusion in the Stop List is a different matter, and the question whether sending a letter containing such a request is an offence within the before mentioned provision of the Larceny Act, 1916, is one upon which an acute difference of opinion arose between the Court of Criminal Appeal in the case of *Rex* v. *Denyer* (3), and the Court of Appeal in the case of *Hardie & Lane* v. *Chilton.* (4) There can be no doubt as to the conflict between these two decisions, which no ingenuity can reconcile. It is for us to say which was right in law.

For myself I feel no doubt; though like others of your Lordships I think that some of the propositions of Scrutton L.J. are too widely stated, and might cover and protect an undoubted blackmailer, I am of opinion that the decision in *Hardie & Lane* v. *Chilton* (4) was correct; and that *Denyer's* appeal (3) should have been allowed. I will assume that

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(1) [1921] 3 K. B. 40.
(2) [1925] A. C. 700.
(3) [1926] 2 K. B. 258.
(4) [1928] 2 K. B. 306.

Denyer's letter (1) and the letter in the *Chilton* case (2) can rightly be said to be letters "demanding . . . . . with menaces"; though I confess that in view of the fact that the payment of money is only one part of an alternative, the end and object of which is protection of trade interest, I feel a doubt whether such letters can properly be brought within the terms of a provision which is undoubtedly aimed at blackmailers. But in order that the offence described in the s. 29, sub-s. 1 (*i.*), of the Larceny Act, 1916, may be established, the jury must be satisfied not only that the accused had uttered a letter or writing demanding of a person with menaces some property or valuable thing, but also that the demand had been made without any reasonable or probable cause. They would have to be satisfied that there was an absence of any reasonable or probable cause.

It is on this point that I think that the decision in *Rex* v. *Denyer* (1) erred. The extract from the summing-up of Talbot J. which is set out in the judgment and which was accepted as a proper direction to the jury, shows that the jury were told in broad terms "a person has no right to demand money, according to the Act of Parliament as a price of abstaining from inflicting unpleasant consequences upon a man." That proposition seems to me far too wide, and so stated it is in effect a direction that no reasonable or probable cause for *Denyer's* (1) demand existed.

I am in agreement with the views expressed by Romer J. in the judgment which he delivered in the *Chilton* case (2) in the course of which he said: "For it is sufficient for the defendants, if they had reasonable cause for making the demand. That they had I can feel no doubt. Having it in their power to place the plaintiffs on the Stop List, but being desirous of taking a more lenient course, they gave the plaintiffs the option of paying a fine. I am wholly unable to understand how it can be suggested that this was not an eminently reasonable thing to do. The question of reasonable or probable cause appears to be one for the jury, but only of course where there is some evidence of its absence. In the present case there is, in my opinion, none."

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(1) [1926] 2 K. B. 258. (2) [1928] 2 K. B. 306.

My Lords, so long as the payment of money demanded in the letter is demanded as part of or in furtherance of the Association's object of promoting trade interests, there cannot in my opinion, be an absence of reasonable or probable cause for the demand. The writer of the letter could not therefore be convicted under the provision of the Larceny Act, 1916, which is here in question. For these reasons I would dismiss this appeal.

LORD WRIGHT. My Lords, the appellant (I may disregard the fact that the original plaintiff has died and been replaced by his executrix) was at all material times a member of the respondent Association. In these proceedings the Court is asked to make declarations whether certain rules of the respondent Association are or are not valid. Whether a declaratory judgment should be made is in any case a matter of the Court's discretion. There is here a further complication in that the action is what is called a friendly action. I have had some doubts whether this action is one in which declaratory relief should be granted. But the questions are not merely abstract, but are of practical importance to persons in the position of the appellant and on the whole I think this House should not refuse to entertain the appeal.

What is in issue is the validity of r. 15, sub-r. 1, of the respondent Association, which is attacked as necessarily contravening a provision of the criminal law, contained in s. 29, sub-s. 1, of the Larceny Act, 1916. The ground of attack has been limited to that section. The action is justified because of the conflict between a decision of the Court of Criminal Appeal in *Rex* v. *Denyer* (1) in a criminal case and a decision of the Court of Appeal in *Hardie & Lane* v. *Chilton* (2) in a civil action. The later decision was followed by the trial judge and the Court of Appeal, without any independent judgments being given. It will be necessary to consider the latter decision as embodying the judgments appealed from.

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(1) [1926] 2 K. B. 258.

(2) [1928] 2 K. B. 306.

The facts and the relevant rules of the respondent Association have been fully placed before your Lordships, and I shall content myself with the barest summary. The object, so far as is here material, of the respondent Association, is generally to promote and protect the interests of its members (inter alia) by preventing cutting or inflating the prices fixed for their goods by manufacturers or sole concessionaire members. This is described as the policy of price protection. In pursuance of that policy the rules of the respondent Association provide that members shall sell such goods at the prices so fixed, neither higher nor lower, and, further, that members shall not sell such goods to any person whether member or not, who sells such goods at other than the fixed prices or sells to any person who supplies to another who sells them at other than the fixed prices. In order to carry out these purposes, a list called the " Stop List " is prepared containing the names of those who, having acted contrary to the price-maintenance provisions, have come within the scope of the prohibition. This list is also circulated in the motor trade journals so that all persons in the trade, whether members of the respondent Association or not, may know to whom such goods are not to be supplied.

That the Stop List is not unlawful in itself was not contested, at least if prepared and published in good faith. Each member of the respondent Association is free in law either to supply or not to supply his goods to any particular individuals ; hence he may lawfully exercise his freedom of choice by deciding not to supply his goods to any person named in the Stop List. An agreement or combination of the members or of the respondent Association and the members not to supply the goods to persons whose names appear in the Stop List is also lawful, provided that the intent of the combination is to promote and protect the legitimate trade interests of the respondent Association and its members and is not a combination wilfully to injure. I take the law on this point as stated by Lord Dunedin in *Sorrell* v. *Smith* (1), who says that "in an action against a set of persons in combination, a conspiracy to injure, followed by actual injury, will give a good cause for action, and motive or intent when the act itself is not illegal is of the essence of the conspiracy." Lord Dunedin states this as being the result of *Quinn* v. *Leathem* (2) after an examination of that case; and of the *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3); and *Allen* v. *Flood.* (4) The opinions of the other members of the House were in substance the same. Indeed the lawfulness of the Stop List of the respondent Association was expressly considered by the House of Lords in *Sorrell* v. *Smith.* (1) The House approved the decision of the Court of Appeal in *Ware & De Freville* v. *Motor Trade Association* (5), where it was held that the publication in the Stop List of the name of the plaintiff who was not a member of the defendant Association was done by the defendants bona fide in the protection of the trade interests of the members of the Association and was therefore not unlawful. In that case, as in *Sorrell* v. *Smith* (1) the essential features were the absence of an intent on the part of the defendants to injure, and the presence of the purpose of the defendants to promote their legitimate trade interests. On these grounds *Quinn* v. *Leathem* (2) was distinguished as being a case where there was a deliberate intention to injure. On the other hand, the *Mogul* case (3) was a case where what the combination did was held to be done in the way of commercial competition: the defendant shipowners had combined to obtain a monopoly of the tea trade from China by offering a discount to customers who only shipped by their vessels, by underbidding the plaintiffs when they put a vessel on the berth, and by taking away their agency from persons who acted as shipping agents for the plaintiffs. All these matters were necessarily injurious to the plaintiffs, but injury to them was not the essence of the combination which was that the defendants should obtain control of the trade in the way of legitimate competition for their own benefit. There were no unlawful means employed. The defendants were lawfully entitled to offer such terms as they thought fit to secure business, even though the result was to take business from the plaintiffs. The decisive question was (to quote Lord Dunedin's words in *Sorrell* v. *Smith* (1) to ask " a jury or a judge whether there was a conspiracy to injure or only a set of acts dictated by business interests." The *Mogul* case (2) was the leading case for the doctrine that the right of every person to be free to trade or employ his services as he will is subject to and conditioned by the similar right in every other person When a person is placed on the Stop List, the traders who refuse to supply him, are exercising their freedom to trade as they will, just as much as the person who exercises his freedom to sell at other than the fixed prices and at any price that suits him. The traders, who refuse to supply him, are free to combine for this purpose so long as they do so within the conditions just stated. In these circumstances the detriment suffered by the trader (if neither the combination nor the means employed are unlawful) gives him no cause of action.

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(1) [1925] A. C. 700, 724.
(2) [1901] A. C. 495.
(3) [1892] A. C. 25.
(4) [1898] A. C. 1.
(5) [1921] 3 K. B. 40.

I have analysed very summarily the reason why the Stop List has been held to be prima facie lawful, that is to say, that a plaintiff can only complain of it if he can show special grounds why it should be held to be unlawful. But it is necessary to pass to the real question in this case—namely, whether so much of the rule is invalid, as it goes on to authorize the respondent Association to offer to a person whose name after due inquiry it has been found proper to place on the Stop List, the option instead of that being done, of paying a sum of money called a fine or penalty, of which under the rules notice must be communicated in writing. An undertaking may also be exacted. Does the sending of such a communication in writing constitute (1.) a letter or writing, (2.) demanding with menaces and (3.) without any reasonable or probable cause, (4.) any property or valuable thing within s. 29, sub-s. 1 (*i.*), of the Larceny Act, 1916?

(1) [1925] A. C. 700, 730. (2) [1892] A. C. 25.

Before I consider the two directly relevant authorities, I shall state briefly how I construe the sub-section. In such a case as that assumed, there is, within the terms of the sub-section, a letter or writing. There must be in it a demand for money, which is property or a valuable thing. I think the word "menace" is to be liberally construed and not as limited to threats of violence but as including threats of any action detrimental to or unpleasant to the person addressed. It may also include a warning that in certain events such action is intended. Thus it might ordinarily include such a threat as the threat to place on the Stop List, which for a motor trader has serious consequences. The crucial question is whether there is an absence of reasonable or probable cause. I find it difficult to give a precise meaning to "probable," as distinguished from "reasonable," and I shall assume that it adds nothing beyond what is meant by "reasonable." The question then is whether there is reasonable cause for the demand. A demand to satisfy the sub-section must be not merely with menaces but with an absence of reasonable cause. Is the liberty in law, which the respondent Association possesses, to put a trader's name on the Stop List, capable in law of constituting a reasonable cause for demanding the money? I have stated the question in this form because I now feel I must observe on a peculiar difficulty in answering the questions put in the statement of claim. The effect of s. 29, sub-s. 1 (*i.*), can only arise for decision in a concrete case. The facts would in that event be before the jury, who would, as I think, in general be asked to find a verdict of guilty or not guilty. For that purpose they would have to decide, after being duly directed in law, if there was a demand in writing, if it was with menaces, if it was without reasonable or probable cause. The last direction would in my opinion need to be carefully explained. I think the jury should be directed by the judge that the respondent Association had a legal right to put the person's name on the Stop List, so long as they did so in order to promote the trade interests of the Association and its members and not with intent to injure, and so long as the money, fine or penalty demanded was reasonable and not extortionate. In other words the jury would have to answer the question suggested by Lord Dunedin "whether there was a conspiracy to injure or only a set of acts dictated by business interests." The question of reasonable cause would have to be applied to the amount of the penalty or fine, as well as to the menace of inserting on the Stop List. If the amount demanded is beyond reason in all the circumstances, there could not be a reasonable cause for demanding that amount regarded merely from the aspect of quantum. There must be a reasonable cause for demanding the particular amount.

When the problem is looked at in this way, it follows that a categorical declaration that the rule is valid could not, if asked for, be made unless the rule is construed as limited to what is reasonable. Otherwise the apparatus under the rule might obviously be used oppressively and for purposes of injury and extortion. But for the purposes of this action, I think that it should be assumed that the rule and the powers under it are implicitly controlled by what is reasonable, and that the rule must be so construed. I proceed on that assumption. In the absence of evidence from which an actual intention to injure can be established or inferred, I think the mere fact that a person has been notified by a demand in writing that his name will be placed on the Stop List unless he pays a fine and gives an undertaking in the words of r. 15, sub-r. 1, would not, as a rule, show a case proper to go to the jury that an offence had been committed under s. 29, sub-s. 1, of the Larceny Act. The prosecution would be required to establish that there was an absence of reasonable cause in the full sense, that what was done was not done in the promotion of the legitimate trade interests of the Association and its members, that there was an intent to injure, and that the money demanded as an alternative to the name being put on the Stop List was extortionate or excessive. The onus is throughout on the prosecution to establish all the elements of the offence. If it appeared on the evidence for the prosecution that though there was a demand in writing with menaces, yet there was reasonable cause in the sense which

I have explained, the case should be withdrawn from the jury. If, however, there was evidence of the absence of reasonable or probable cause, then the jury must decide after hearing the whole case.

In *Rex* v. *Denyer* (1) the Court of Criminal Appeal upheld a conviction under s. 29, sub-s. 1, of the Larceny Act against the superintendent of the respondent Association's Stop List. A motor dealer named Read, not a member of the Association, had offered to sell a car at a certain price named by him and had sold a tyre. An inquiry was held by the Council of the Association, at which Read appeared; then a letter was sent by the defendant on behalf of the Association offering to Read the option of paying 250*l.* and 7*l.*, as the alternative to his name being included in the Stop List. The jury convicted under s. 29, sub-s. 1. On appeal the conviction was upheld. Lord Hewart L.C.J. said: "In the opinion of this Court there was not merely some, but ample and overwhelming material for the consideration of the jury in this case. It has been said again and again, that because this Trade Protection Association had the legal right to put the name of Mr. Read upon the Stop List, it therefore had a legal right to demand money from him as the price of abstaining from putting his name upon the Stop List. In the opinion of the Court, that proposition is not merely untrue; it is precisely the reverse of the truth. It is an excuse which might be offered by blackmailers to an indefinite extent. There is not the remotest nexus or relationship between a right to put the name of Mr. Read upon the Stop List, and a right to demand from him 257*l.* as the price of abstaining from that course." I cannot, with great respect, accept this as a correct or sufficient statement of the law. I do not know the facts of the case except so far as they appear in the report. But I cannot find in the facts as reported any evidence of the offence charged proper to go to the jury. It does not appear that the complaint was directed to the amount demanded being extortionate. The objection taken was that any money at all was demanded. I need not repeat that it may be quite legitimate, for the

(1) [1926] 2 K. B. 258.

reasons I have stated above, to give the trader the option of paying a reasonable sum of money as an alternative to the Association taking, as under proper circumstances they lawfully might, the much more damaging course of putting the trader's name on the Stop List. The matter may thus resolve itself into a mere question for the trader to decide which alternative is for him commercially more expedient. As I shall explain later when I discuss the judgment of the Court of Appeal in *Hardie & Lane* v. *Chilton* (1), there may be blackmail where a man is threatening to do something which he is at liberty lawfully to do. But the fact that the Stop List is in proper cases legitimate will constitute in such cases reasonable cause for a reasonable demand. On the other hand, the Stop List cannot be lawfully used as an instrument of extortion and oppression. Later in his judgment Lord Hewart quotes part of the summing up of the trial judge. I shall only repeat one short passage : " A person has no right to demand money . . . . as a price of abstaining from inflicting unpleasant consequences upon a man." It is always difficult to criticize a short passage in a summing-up, but the general proposition as stated cannot, I respectfully think, be justified, and constituted a material misdirection. There are many possible circumstances under which a man may say to another that he will abstain from conduct unpleasant to the other only if he is paid a sum of money. Thus he may offer not to build on his plot of land if he is compensated for abstaining. He is entitled to bargain as a consideration for agreeing not to use his own land as he lawfully may, and the other man may think it worth while to pay him, rather than have the amenities of his house destroyed by an eyesore. Or a valued servant may threaten to go to other employment unless he is paid a bonus or increased wages. Or a man may offer to abstain from prosecuting for a common assault or infringement of his trade mark if he is paid compensation for the civil wrong or if the other man makes a public apology, as in *Fisher & Co.* v. *Apollinaris Co.* (2) Many similar instances may be given.

As I read the report, I am bound with respect to say that the decision in *Rex* v. *Denyer* (1) was in my opinion wrong. I cannot accept the propositions of law which I have just quoted as accurate statements of the general law or as a proper direction to a jury.

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(1) [1928] 2 K. B. 306.

(2) (1875) L. R. 10 Ch. 297.

I turn to *Hardie & Lane* v. *Chilton.* (2) That was a civil action. The plaintiffs were members of the Motor Trade Association, and had been offered under the rules, as an alternative to being placed on the Stop List, the option of paying 200*l.* in addition to buying back the car which had been sold below the list price and giving an undertaking. They agreed, and paid 100*l.* on account of the 200*l.* Later, becoming aware of the decision in *Rex* v. *Denyer* (1) they issued a writ claiming repayment of what they had paid. The jury, having been directed by Avory J. that to obtain money for which there was no legal claim by threats calculated to deprive a man of his voluntary power of action was illegal, whether done by two or more persons in agreement or by one person only, found a verdict for the plaintiffs. The Court of Appeal set the verdict aside and entered judgment for the defendants, holding that the case should have been withdrawn from the jury. Romer J. thus summed up his opinion (3): "It is sufficient for the defendants if they had reasonable cause for making the demand. That they had I can feel no doubt. Having it in their power to place the plaintiffs on the Stop List, but being desirous of taking a more lenient course, they gave the plaintiffs the option of paying a fine. I am wholly unable to understand how it can be suggested that this was not an eminently reasonable thing to do." On these assumptions of fact, I completely agree. I think that the case was rightly decided. There are, however, in the judgments of the Court of Appeal, various observations not necessary for the decision, on s. 29, sub-s. 1, of the Larceny Act, which I do not think can be fully supported. Thus Scrutton L.J. says (4): "if there is no evidence on which a jury could find lack of reasonable and probable cause in that the act threatened is all which the defendant had a right

(1) [1926] 2 K. B. 258.
(2) [1928] 2 K. B. 306.
(3) [1928] 2 K. B. 335.
(4) Ibid. 322.

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to do, the judge should withdraw the case from the jury, and that such a case is where the threatener has a legal right to do what he threatens." If by "right to do" it is intended to refer to a right of a man to use his property as he desires or to give or withhold his services without any breach of contract as he desires, or to abstain from legitimate competition, the proposition seems to me to be correct. I may add to the instances I have given above, such a case as that of the owner of multiple stores offering not to open a shop in a particular locality if a tradesman or tradesmen in the locality will compensate him for so doing. [But there are many cases where a man who has a "right," in the sense of a liberty or capacity of doing an act which is not unlawful, but which is calculated seriously to injure another, will be liable to a charge of blackmail if he demands money from that other as the price of abstaining. Such instances indeed are very typical cases of blackmail, either under ss. 29, 30 or 31 of the Act.] Thus a man may be possessed of knowledge of discreditable incidents in the victim's life and may seek to extort money by threatening, if he is not paid, to disclose the knowledge to a wife or husband or employer, though the disclosure may not be libellous. Such is a common type of blackmail. Cases where the non-disclosure to the proper authority is illegal as amounting to compounding a felony or a misdemeanour of public import, or where the publication would constitute a criminal libel, are a fortiori. Again a legal liberty (that is something that a man may do with legal justification) may form the basis of blackmail. Thus a husband who has proof of his wife's adultery, may threaten the paramour that he will petition in the Divorce Court unless he is bought off. Though it is possible that the facts of such a case might show merely the legitimate compromise of a claim to damages, on the other hand, the facts might be such as to constitute extortion and blackmail of a serious type.

I cannot assent to the proposition that s. 29, sub-s. 1, is sufficiently excluded once it is shown that the act threatened is not a legal wrong in itself, that is, something which the person threatening may either do or not do without a breach of the law, something which may better perhaps be described as a legal liberty than a legal right.

I may add that I do not find in s. 29, sub-s. 4, a comprehensive definition of menaces or threats but merely an explanation in view of certain provisions of the earlier sub-sections.

The two declarations asked for distinguish the cases of a member and of a non-member of the respondent Association. There are no doubt certain differences between these cases, because a member has agreed to be subject to the rules, whereas a non-member has not. But even a member cannot legally consent in advance to be the victim of an offence under s. 29, sub-s. 1. If, however, the rule is construed as limited to what is reasonable as in my opinion it should be, I think the declarations claimed should be refused.

LORD ROCHE. My Lords, I also am of opinion that this appeal should be dismissed. Your Lordships who have already given your opinions have dealt with the facts of the case and the authorities bearing on the matters under discussion so fully and in a sense so completely meeting with my concurrence that I can state shortly the steps which lead me to the conclusion I have expressed.

This action and appeal can only succeed if the exercise by the respondents of the powers they assume under the rules to require payment of money in lieu of placing a name on the Stop List must involve an illegality, to wit an offence under s. 29 of the Larceny Act. If the direction given by the trial judge to the jury in *Rex* v. *Denyer* (1) and approved by the Court of Criminal Appeal is correct then such an illegality is necessarily involved. The passage from the summing up of the learned trial judge quoted in the opinions already delivered clearly amounts to a direction that the demand of any money at all is a demand made without reasonable or probable cause. This direction is in my judgment contrary to the principles implicit in the decision of this House in *Sorrell* v. *Smith* (2), approving *Ware & De Freville* v.

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(1) [1926] 2 K. B. 258.

(2) [1925] A. C. 700.

Motor Trade Association. (1) The reason why procedure by way of Stop List was there held not to be unlawful was that though it was taken by persons acting in combination the intent of the procedure was the protection of the defendants' trade interests. But if the protection of trade interests from damage and injury could be lawfully effected by means of a Stop List, though the Stop List would damage the plaintiffs, the conclusion seems to be necessarily involved that in lieu of procedure by Stop List money compensation might lawfully be asked and accepted in respect of the injury to the defendants' trade interests done by the plaintiffs. Money adjustments of business injuries are normal and lawful, and, accordingly, merely to ask for or to demand money as an alternative to the placing of a name on the Stop List cannot in my judgment be properly said to be making a demand without reasonable or probable cause.

It will be observed that I have confined my observations on *Denyer's* case (2) to the question of the direction to the jury and have stated my opinion that it is too broadly expressed and cannot be supported. It may be—I do not know enough of the facts to express an opinion—that there were facts in that case proper to be left to the jury with another direction upon which the jury would have been entitled to convict. I agree entirely with my noble and learned friend Lord Wright in his views as to the proper directions to, and questions for, a jury, and, in particular, I agree that if a sum is demanded in the manner struck at by the statute there must be reasonable and probable cause for demanding that very sum. A demand of a sum extortionate in amount would, I think, clearly be evidence fit to be left to a jury in a civil case of an intent to injure as opposed to an intent to protect trade interests and in a criminal case of the fact that the sum was demanded without reasonable or probable cause. I also agree that in the judgments of the Court of Appeal in the case of *Hardie & Lane* v. *Chilton* (3) there are statements which taken literally do not accurately state the law in that they

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(1) [1921] 3 K. B. 40.
(2) [1926] 2 K. B. 258.
(3) [1928] 2 K. B. 306.

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would seem to import that no demand of money in connection with a Stop List could amount to an actionable wrong or to a crime. It would, in my opinion, be both erroneous and mischievous to give colour to the opinion that because a demand of money in such a connection is not necessarily unlawful or a crime it cannot under any circumstances be either the one or the other. At the same time I do not entertain any doubt that in the case of *Hardie & Lane* v. *Chilton* (1) the correct conclusion was reached by the Court of Appeal. The plaintiffs were members of the Association consenting to but breaking its rules, and it was plain on their own evidence that they regarded the money demand as welcome, because more merciful to them as offenders, than appearance in the Stop List. This is indeed a typical case where, had the proceedings been in the nature of a criminal prosecution under the Larceny Act and had the same evidence been given for the prosecution as was given for the plaintiffs in the civil proceedings, the proper direction to the jury would have been that there was no evidence upon which they could find an absence of reasonable or probable cause for the demand, and that they ought to return a verdict of not guilty. That case therefore provides a clear example of how the rules sought to be impeached in this action can be applied in practice without illegality. The case of a non-member of the Association does not in my opinion differ from that of a member in any material respect, save that in the case of a member proof of the absence of reasonable and probable cause for demanding the sums fixed by the rules would obviously be more difficult if not insuperable.

My Lords, these are my reasons for thinking that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Nicholson, Graham & Jones.*
Solicitors for respondents: *Michael Abrahams, Sons & Co.*

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(1) [1928] 2 K. B. 306.

Applied. BISHOP *v.* CUNARD WHITE STAR, LTD. [1950] 2 All E.R. 22.

[HOUSE OF LORDS.]

H. L. (E.)* ROSE . . . . APPELLANT;

AND

FORD . . . . RESPONDENT.

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April 27, 29, 30; *June* 25.

Damages—Negligence—Personal injuries—Death of injured person—Claim by administrator for benefit of deceased's estate—Claim for shortening of expectation of life—Survival of cause of action—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1.

A young woman was injured in a motor accident due to the negligence of the defendant. Her injuries were serious, including a combined fracture of her right leg and thigh. Two days later gangrene set in, and it became necessary to amputate the leg; but the infection had already spread above the point of severance, and two days later she died as the result of the injuries, having been unconscious the greater part of the four days she survived the accident. Her father, as her administrator, brought an action claiming damages (inter alia) under the Law Reform (Miscellaneous Provisions) Act, 1934, for the shortening of her expectation of life:—

Held, that there was vested in the deceased before she died a cause of action which entitled her to sue for loss of expectation of life, and under the Act of 1934 that cause of action survived, and, so surviving, was enforceable by the appellant as her personal representative.

Flint v. *Lovell* [1935] 1 K. B. 354 approved.

Held also, that the principle laid down in *Flint* v. *Lovell* is not confined to the case where the injured person is alive at the date of the action.

Decision of the Court of Appeal [1936] 1 K. B. 90 reversed.

APPEAL from a decision of the Court of Appeal.

On August 4, 1934, a young woman named Mabel Alice Rose, twenty-three years of age, was a passenger in a motor-cycle combination when a collision occurred between it and a motor-car driven by the defendant, the collision being due to the negligence of the defendant. In consequence of the accident Miss Rose was severely injured, sustaining a combined fracture of her right leg and thigh. On August 6 gangrene set in and it became necessary to amputate the leg; but the infection had already spread above the point of severance,

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROCHE.

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and on August 8 Miss Rose died as a result of her injuries, she having been unconscious the greater part of the four days she survived since the accident.

The father of Miss Rose, as her administrator, brought an action against the defendant and claimed damages under the Fatal Accidents Acts, 1846 to 1908, for her dependants, and under the Law Reform (Miscellaneous Provisions) Act, 1934 (1), for the benefit of her estate.

The plaintiff's claim for damages under the Act of 1934 was put under three heads: first, as a claim for the damages which the deceased could have recovered, if she had lived, for pain and suffering; secondly, a claim for the loss of her leg; and thirdly, as a claim, based, on the principle decided in *Flint* v. *Lovell* (2), on the shortening of her expectation of life by the wrongful act of the defendant.

The action was tried by Humphreys J., who assessed the damages on the claim under the Fatal Accidents Acts, as to which liability was admitted, at 300*l*. As to the claim for damages under the Act of 1934 he held that the plaintiff as the administrator of the deceased was entitled to recover for the benefit of her estate damages for her pain and suffering, but that those damages must be limited to the four days during which she survived. She had, however, lost a leg, which was a permanent loss, and in respect of that and for the pain and suffering for the four days he awarded 500*l.* He rejected the ground of claim for loss of a reasonable expectation of life because there was no evidence of any mental suffering being caused to the deceased by reason of the shortening of her expectation of life, which he thought was the basis of the decision in *Flint* v. *Lovell.* (1)

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(1) Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, sub-s. 1: "Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action . . . . vested in him shall survive . . . . for the benefit of his estate."

Sub-s. 2: "Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:— . . . . (*b*) in the case of a breach of promise to marry shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry; (*c*) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included."

Sub-s. 5: "The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908, or the Carriage by Air Act, 1932. . . . ."

(2) [1935] 1 K. B. 354.

The defendant appealed on the ground that the judge was wrong in allowing anything for pain and suffering and for the loss of the leg; and the plaintiff cross-appealed against the disallowance of the claim for damages for the shortening of the deceased's expectation of life.

The Court of Appeal held (1.) that the plaintiff as administrator was entitled to recover damages in respect of the claim for pain and suffering limited to the four days the deceased survived the accident, and those damages the Court fixed at 20*l.*; (2.) that the deceased would have been entitled to nominal damages only in respect of the loss of her leg as she only survived the amputation for two days, and the Court fixed those damages at 40*s.*; and (3.) (Greer L.J. dissenting) that damages could not be recovered in respect of the deceased's shortened expectation of life.

The plaintiff appealed to this House.

1937. April 27. *Lord Reading K.C.*, *Arthur S. Ward* and *A. H. Glenn Craske* for the appellant. No question now arising on the original claim under the Fatal Accidents Acts, the points for decision are (*a*) what cause of action against the respondent was vested in the deceased at the time of her death and transmitted on that event to the appellant as her representative by virtue of the Law Reform (Miscellaneous Provisions) Act, 1934; and (*b*) what damages are recoverable by the appellant, particularly in respect of the shortening of the deceased's expectation of life. On the first point we contend that the Act of 1934 transmits every existing cause of action, and the consequent right to damages which was vested in the deceased, the only limitation on the generality of this

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(1) [1935] 1 K. B. 354.

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statement being that under the Act in an action for breach of promise of marriage the damages recoverable by the deceased promisee's representative are those exclusively relating to her estate. As with the exception just mentioned all rights which were vested in the deceased passed to her representative it follows that the right to damages in respect of her shortened expectation of life passed to and is enforceable by the appellant. Slesser L.J. and Greene L.J. held that the principle of *Flint* v. *Lovell* (1), which decided that loss of expectation of life is a valid head of damages only where the action is brought by the person who has suffered the damage, and that where the person injured dies the principle of *Baker* v. *Bolton* (2), which said that " in a civil court, the death of a human being could not be complained of as an injury," precluded the transmission of such a right to damages. We contend that the right to recover for the loss of the expectation of life is not so limited. It is suggested that the right to claim for such a loss only arises where the person injured could be shown to have been mentally distressed at the prospect of early death owing to the accident; that is, applying what has been called a subjective test. There is no warrant for limiting the right in this way. What should be regarded is what may be called the amenity value of her life to the deceased, and if that is right, why should not damages under this head enure for the benefit of the deceased's estate? The fact that the person injured has died is irrelevant for this purpose. We adopt Sir Frederick Pollock's comment on *Flint* v. *Lovell* (1) in 51 Law Quarterly Review, p. 268, where he said this: " But in the Court of Appeal the question was put, seemingly without protest, in a different form, namely, whether the shortening of one's own life is a detriment for which one can claim damages while living. Now surely the answer to the question so put is that it is not possible for any human tribunal to attach any definite meaning to the term or, for that matter, to say whether death, when it happens, is in itself a bad or a good thing. The only way of obtaining a result is to go back to the firmer ground of considering the expectation of

(1) [1935] 1 K. B. 354.

(2) (1808) 1 Camp. 493.

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life as that which was diminished. . . . . As to the rule that the death of a human being cannot give a cause of civil action at common law, it is submitted with all respect that it has nothing whatever to do with the case." Applying that to this case the deceased's expectation of life was diminished; that gave a right to the deceased to compensation which by the Act of 1934 passed to her representative.

Sir William Jowitt K.C., *Croom-Johnson K.C.* and *Montague Berryman* for the respondent. All damage to the human body must be regarded subjectively, that is, from the standpoint of the person injured. Loss of a limb does not in the legal aspect differ from any other kind of injury—for example, shock. It may produce loss of earning power and loss of the amenities of life, and those are the things that have to be compensated; but if the person injured is unconscious, and dies without regaining consciousness, it would be wrong to award damages for a shortened expectation of life, which is a purely subjective thing. In referring to the decision in *Flint* v. *Lovell* (1) and the decision of the Court of Appeal in the present case (2), the editor of Salmond on Torts, 9th ed., p. 363, says, and we adopt his statement, that "damages for shortened expectation of life should not be given as an independent head of damage but should be taken into account as a subjective element in awarding damages for pain and suffering. Such damages should be excluded as an independent head of damage not because of the rule in *Baker* v. *Bolton* (3) but because it is, in the language of Parke B. in *Armsworth* v. *South Eastern Ry.* (4), 'impossible to form an estimate of the value of human life either to a man himself or to others connected with him.' 'The claim is one for loss of life as a good in itself, irrespective of its financial advantages' (5). For the happy and contented no damages would be adequate; for the man on the point of suicide any damages would be excessive. How is any judge or jury to determine?" Till *Flint* v. *Lovell* (1) the right to recover damages for shortened expectation of life had never been suggested, and that case, where the subjective test was obviously applied, should not be extended. We adopt Roche L.J.'s observations in that case (1): "Though it is no doubt true that the law of England is not in all respects logical, it would seem to go to an extreme in lack of logic if, while the death of a human being does not, apart from statute, give a right of action, and does not, where a cause of action exists, found or constitute an independent right or head of damage, yet the shortening of life can give such right of action, and can found or constitute an independent right or head of damage. There would thus, as it seems to me, be allowed to the shortening of life an efficacy which is denied to its extinction, and to death in the future an efficacy which is denied to death on the instant." Even if *Flint* v. *Lovell* (2) was rightly decided its principle applies only to a person who is alive, in which case there is no infringement of the rule laid down in *Baker* v. *Bolton* (3) and approved in *Admiralty Commissioners* v. *S.S. Amerika*. (4) The Law Reform (Miscellaneous Provisions) Act, 1934, did not create new causes of action; it merely altered the adjective law by providing that such causes of action as the deceased had should be transmitted to his or her representative.

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(1) [1935] 1 K. B. 354.
(2) [1936] 1 K. B. 90.
(3) 1 Camp. 493.
(4) (1847) 11 Jur. 758, 759.
(5) Per Greene L.J. in *Rose* v. *Ford* [1936] 1 K. B. 90, 110.

[*Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (5) and *Phillips* v. *London and South Western Ry. Co.* (6) were also referred to.]

Lord Reading K.C. in reply. In *Reid* v. *Lanarkshire Traction Co.* (7), Lord Sands said that "while the doctrine of an award in respect of the shortening of life may have originated in the theory of mental disquiet about the prospect or the possibility of death between the date of the accident and the date of death that doctrine is now a matter positivi juris irrespective of the presence or absence of evidence as to the sufferer's state of mind in the particular case."

The House took time for consideration.

(1) [1935] 1 K. B. 367.
(2) Ibid. 354.
(3) 1 Camp. 493.
(4) [1917] A. C. 38.
(5) (1875) L. R. 10 C. P. 189.
(6) (1879) 5 Q. B. D. 78.
(7) 1934 S. C. 79.

June 25. LORD ATKIN. My Lords, this case involves a question of damages for personal injury in a claim brought by the administrator of the injured person under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934. The deceased was a girl of twenty-three who was seriously injured in a motor-car collision by reason of the negligent driving of the respondent, the defendant. The accident happened on August 4: the girl's right leg was seriously injured. On August 6 it was amputated: and on August 8 she died as the direct result of the injury to the leg. The plaintiff, the father, who had taken out letters of administration to the girl's estate, sued in two capacities, first, to recover damages for himself and his wife as dependants under the Fatal Accidents Acts, 1846 to 1908; second, to recover damages for the benefit of the estate of his daughter under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934. The case was heard before Humphreys J. Under the first head he awarded 300*l.* damages. The learned judge further awarded the sum of 29*l.* 2*s.* 11*d.* special damage, which included funeral expenses, and this sum has been treated as awarded under the first head. On this sum of 329*l.* 2*s.* 11*d.* no further question has arisen. Under the second head the learned judge awarded the sum of 500*l.* for pain and suffering and the loss of the right leg. He refused to award any damages for loss of expectation of life, being of opinion that the only ground for such damages was the mental suffering caused to the girl by the shortening of her expectation of life: and that in the circumstances of this case no such pain or suffering was proved.

The defendant appealed against the award of 500*l.*: and the plaintiff cross-appealed against the refusal to award damages in respect of loss of expectation of life.

In the Court of Appeal all the members of the Court were agreed that the judge was mistaken in thinking that the reason for giving damages for loss of expectation of life in the decision in *Flint* v. *Lovell* (1) was mental pain and suffering from contemplation of the loss. The majority, however, Slesser and

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(1) [1935] 1 K. B. 354.

Greene L.JJ., held that no such damages could be recovered after the injured person had died. Greer L.J. was of opinion that the right to such damages vested in the injured person at the moment of injury and survived to the administrator. All the judges were agreed that there could be no damages for loss of the leg other than for the loss for four days. They agreed that damages for pain and suffering and loss of leg should be reduced to 22*l.* They were also all agreed that if damages for loss of expectation of life could be given the proper sum was 1000*l.* In the result the damages of 500*l.* awarded by the trial judge were reduced to 22*l.* The appeal succeeded to that extent and the cross-appeal was dismissed.

The appellant appeals therefore in respect of appeal and cross-appeal.

My Lords, it appears to me important to distinguish between two principles of law which are involved in this case. The first is that claims for personal injuries caused by tort by the common law did not survive to the executor. Actio personalis moritur cum persona. The second is that the law did not recognize the death of a person as giving a claim for damages. This had no application to the death of a supposed plaintiff: for the first maxim prevented his personal representatives from suing. But if a third party negligently killed either wife or servant of the plaintiff he could not recover. The rule is crystallized in *The Amerika.* (1) The reasons given, whether historical or otherwise, may seem unsatisfactory; but it is of little purpose in a legal decision to criticize them, for the rule has the authority of this House. But the question is, Does the rule affect the calculation of damages the right to which is vested in a living person? Now in *Flint* v. *Lovell* (2) the plaintiff was alive at the trial: indeed we are told that he is still alive. The Court of Appeal held that if a person suffered personal injuries from negligence there could be included in the estimate of damages consideration of the fact that by the wrongful injury his normal expectation of life had been shortened.

My Lords, this decision seems to me simple and inevitable:

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(1) [1917] A. C. 38.

(2) [1935] 1 K. B. 354.

and I am satisfied that it has always been a usual element in assessment of damages in such cases. A man is injured in the prime of life: evidence is given that he is not likely to live more than two or three years: the tribunal estimating damages will take this fact into account not only in estimating actual money loss: for he may not be in a position to earn or be capable of earning anything, but as an item of personal damage. It does not seem to me necessary to say that a man has a personal right of the nature of property in his life, so that when it is diminished he loses something in the nature of valuable property. I do not say that this is not so: but I am satisfied that the injured person is damnified by having cut short the period during which he had a normal expectation of enjoying life: and that the loss, damnum, is capable of being estimated in terms of money: and that the calculation should be made. There seems to me to be a substantial distinction between damages awarded to the living, because life is shortened, and damages to a third person, because of some other person's death. I see no reason for extending the illogical doctrine of *The Amerika* (1) to any case where it does not clearly apply. As to the supposed foundation of the doctrine in the law relating to felony I will only say that if the rule is really based on the relevant death being due to felony, it should long ago have been relegated to a museum: for deaths by negligence are often not felonious, and where they happen more than a year and a day after the wrongful act cannot be.

I am of opinion therefore that a living person can claim damages for loss of expectation of life. If he can I think that right is vested in him in life, and on his death passes under the Act of 1934 to his personal representative. I do not see any reason why the fact that the expectation is realized, i.e., that death comes at the time anticipated or sooner, should make any difference. How the damages are to be calculated is a question which this House has not to decide, for there has been no quarrel with the amount fixed by the Court of Appeal in this case of 1000*l*. Whether the rich man's life

(1) [1917] A. C. 38.

has greater potentialities of pleasurable enjoyment than the poor man's, and what consideration should be given to physical weaknesses other than those caused by the accident and not affecting the duration of life I prefer to consider when, if ever, the points are raised. I can see the possibility of discussion in the provision of sub-s. 2 (*c*) that the damages "shall be calculated without reference to any loss or gain to his estate consequent on his death." Plainly this does not mean that his estate is not to gain by the award of any damages at all, for this would be absurd. Can the damages include a calculation of loss of income which the deceased would have received during normal expectation of life but would not have saved so as to increase his estate? I express no opinion. As to the damages for loss of the leg I think that it must be taken that the award of 1000*l.* assumed a normal two-legged life. If so no further damages can be given for the particular loss: and I express no opinion as to whether on another basis of calculation the Court of Appeal would be right in fixing the damages in respect of the loss of the leg for four days only.

I should add that I see no difficulty as to the alleged duplication of damages under the Act of 1934 and the Fatal Accidents Acts. If those who benefit under the last mentioned Acts also benefit under the will or intestacy of the deceased personally, their damages under those Acts will be affected. If they do not, there seems no reason why an increase to the deceased's estate in which they take no share should affect the measure of damages to which they are entitled under the Act.

For these reasons I am of opinion that the appeal should be allowed: that the order of the Court of Appeal on appeal and cross-appeal be set aside: that the judgment of Humphreys J. be varied by increasing the sum awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, to 1022*l.* and directing that judgment be entered for the plaintiff for 1351*l.* 2*s.* 11*d.* with costs: and that the defendant do pay to the plaintiff the costs of the appeal and cross-appeal and the costs in this House appropriate to a successful pauper appellant.

LORD THANKERTON. My Lords, I concur.

LORD RUSSELL OF KILLOWEN. My Lords, the legal personal representative of the deceased girl, bringing an action under and by virtue of s. 1, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934, recovered damages for the benefit of her estate under two heads—namely: (1.) special damage, including funeral expenses, 29*l.* 2*s.* 11*d.* and (2.) 500*l.* for pain and suffering, including the loss of a leg. I disregard the further sum of 300*l.* recovered for the benefit of dependants under the Fatal Accidents Acts, as to which no question arises. Humphreys J., who tried the action, refused to award any damages for the girl's loss of expectation of life, which damages had been claimed upon the authority of *Flint* v. *Lovell.* (1) He thought that the basis of that decision was the view that damages should be awarded for the suffering caused to a person by the knowledge that the term of her life had been shortened, and that as there was no evidence that any such suffering had been caused to the girl, no damages could be awarded.

The defendant appealed against so much of the judgment as awarded the 500*l.* The plaintiff, by notice of cross-appeal, asked to have the damages awarded for the benefit of the estate increased by a sum of damages in respect of the shortening of the girl's expectation of life.

The Court of Appeal unanimously reduced the 500*l.* to the sum of 22*l.*, composed of 20*l.* for pain and suffering, and 40*s.* as damages for the loss of the leg, those damages being treated as nominal in view of the fact that the girl only lived for two days after the amputation. On the cross-appeal the Court was not unanimous, except upon two points. They agreed that if damages for loss of expectancy of life were recoverable, the amount should be fixed at the sum of 1000*l.* They further agreed that Humphreys J. had taken a wrong view as to the basis of the decision in *Flint* v. *Lovell* (1), the basis of that decision being that a person may obtain damages simpliciter for the shortening of his expectation of life, not for the pain which he suffers from the knowledge that his life will be of shorter duration.

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(1) [1935] 1 K. B. 354.

Greer L.J. was of opinion, upon the authority of *Flint* v. *Lovell* (1), that such damages would have been recoverable by the deceased ; that such damages therefore were damages which the defendant would have had to pay in respect of the cause of action vested in the deceased at her death, and that accordingly the right to them survived to her legal personal representative by reason of the words of s. 1 of the Act of 1934.

Slesser and Greene L.JJ. took a different view. Slesser L.J., while being of opinion that the deceased could have sued for and obtained damages for loss of expectation of life, held that no cause of action on this head could survive for the benefit of her estate, his reason, apparently, being that it would be essential to prove *at the trial* that she then possessed an expectation of life which the defendant's negligence had curtailed ; and that this proof had become impossible by reason of her death. That is what I understand the Lord Justice to mean when he says (2) : "Before the passing of the 1934 Act, her death would have put an end to such right of action as she possessed by reason of the 'actio personalis' doctrine ; that right now survives, but, nevertheless, I do not think it operates to extend the condition on which she would otherwise have had to rely, namely, that she, a living person, *still* possessed an expectation of life which the accident had curtailed." He then holds, on the view that her death converted the defendant's wrongful act into a felony, that to award damages to the estate for the girl's loss of expectation of life would in fact be to award damages in respect of the felony of causing her death, within the principle of *The Amerika* case. (3)

Greene L.J. thought that the principle laid down in *Flint* v. *Lovell* (1) should be confined to cases where the injured person is still alive at the date of the action, and that in the present case the substance of the claim was a claim by an administrator for damages for loss of the deceased's life, and not a claim originally vested in a living person. He also relied on *The Amerika* case. (1)

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(1) [1935] 1 K. B. 354.
(2) [1936] 1 K. B. 107.
(3) [1917] A. C. 38.

My Lords, I find a difficulty, if *Flint* v. *Lovell* (2) was correctly decided, in following the reasoning of the majority in the Court of Appeal. The question which we have to consider is not what would be the rights of a deceased person if defined and adjudged at some date subsequent to his or her death ; nor is there any question of extending any principle. It is simply a question of the meaning and effect of the Act of Parliament, which, as I read it, has made available and realizable for the benefit of a dead person's estate, causes of action which were vested in him when alive. Sect. 1, sub-s. 1, does not apply to certain specified causes of action ; but with those exceptions, which are irrelevant to this case, on the death of a person after July 25, 1934—I quote the relevant words—" all causes of action . . . . vested in him shall survive . . . . for the benefit of his estate." Sub-s. 2 restricts the damages recoverable. They are not to include exemplary damages, and where the death has (as here) been caused by the act or omission which gives rise to the cause of action, the damages recoverable are to be calculated without reference to any loss or gain to the estate consequent on the death, except that a sum in respect of funeral expenses (which would be such a loss) may be included. Sub-s. 2 has no application to the present case, for the damages claimed are not for loss to the estate consequent on the death, but for loss to a living person consequent on the wrongful act of the defendant.

My Lords, I agree with Greer L.J. that the object of the statute, as appearing from its language, is to put a person, who has by his negligence caused damage to some one who has subsequently died, in the same position as regards liability (subject to certain qualifications which do not apply to the present case) as he would have been in, if the injured person had sued and recovered judgment while still alive.

If *Flint* v. *Lovell* (2) was correctly decided, there was vested in Mabel Alice Rose before she died a cause of action which entitled her to sue for and obtain judgment for 1000*l*. damages

(1) [1917] A. C. 38. (2) [1935] 1 K. B. 354.

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in respect of her loss of expectation of life. Under the section that cause of action is made to survive for the benefit of her estate, and so surviving is enforceable by her legal personal representative against the defendant. I can see no escape from the plain words of the section.

The question then remains—was *Flint* v. *Lovell* (1) correctly decided? I think it was. I am of opinion that if a person's expectation of life is curtailed he is necessarily deprived of something of value, and that if that loss to him is occasioned by the negligence of another, that other is liable to him in damages for the loss. That cause of action was vested in the deceased before and when she died, and by virtue of the Act of 1934 it survives for the benefit of her estate. It is no new cause of action created by that Act; it is a cause of action existing independently of the Act, which by the Act is preserved from the extinction which the death of the deceased would otherwise have brought about.

In regard to the suggestion that this claim is in some way defeated by the doctrine enunciated in *Baker* v. *Bolton* (2) and affirmed by this House in *The Amerika* case (3), I am unable to appreciate how that doctrine can have any application here. As I understand the doctrine it is this, that at common law no one can maintain an action against a person who by his wrongful act, neglect or default has caused the death of another. The action there contemplated is clearly not an action by any one asserting a claim in right of the deceased, but an action by a person asserting a claim in his own right to be recouped the damages occasioned to him personally by the death of the deceased. That common law doctrine is capable of alteration by statute, and the Fatal Accidents Acts exemplify such an alteration. But the Act of 1934 stands on quite a different footing. It in no way affects or deals with the common law doctrine. It creates no cause of action against a person causing the death of another, for damages occasioned to the plaintiff by that death. It does not (except as regards funeral expenses) contemplate,

(1) [1935] 1 K. B. 354.
(2) 1 Camp. 493.
(3) [1917] A. C. 38.

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much less does it create, any cause of action in any one for damages resulting from death. What it does is (with certain exceptions) to preserve, notwithstanding the death of a person, all causes of action vested in that person when he died; but the claim to be asserted, is a claim in right of the deceased person.

For the reasons which I have endeavoured to indicate I would allow the appeal, the plaintiff recovering judgment for the sum of 1000*l.* in addition to the sum covered by the order of the Court of Appeal.

In regard to the reduction of the damages for the loss of the leg to a nominal sum, I think that a jury at the trial might in assessing the damages claimed on behalf of the estate for the loss of the limb, properly be influenced by the fact that in the events which actually happened, the use of the limb was lost only for a nominal period of time. I am not prepared to disagree with the views and conclusions of the Court of Appeal in this regard.

Lord Wright. My Lords, this appeal requires your Lordships to decide an important question of construction arising on the Law Reform (Miscellaneous Provisions) Act, 1934. The portions of the Act which are material are those contained in s. 1, which are referred to in the statutory heading of the Act, which describes it as "An Act to amend the law as to the effect of death in relation to causes of action." The vital words are to be found in s. 1, sub-s. 1: "Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate." The various qualifications which follow do not touch the essential scope of this provision. They are not in fact directly material for the decision of this case, but may be summarized thus: there is first a proviso that the survival of causes of action is not to apply to certain specified claims for damage—namely, for defamation, seduction, enticing away a spouse, or adultery: next, specific restrictions are placed on the amount of damages

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recoverable in certain cases where the Act applies; thus exemplary damages are excluded, and in the case of a breach of promise to marry the claim is limited to the damage, if any, to the estate. Then in s. 1, sub-s. 2 (*c*), there is the important proviso that "where the death of that person has been caused by the act or omission which gives rise to the cause of action, [the damages] shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included."

The other terms of the section and the terms of s. 2 may, so far as material, be left for reference later. I need here only observe that s. 1, sub-s. 5, and s. 2 deal with a different form of action, that is, an action brought by, and for the benefit of, a limited class of third persons who have suffered particular damage by the death. Such actions are statutory and were first made competent under the Fatal Accidents Act, 1846, and are only maintainable under the particular limitations and conditions specified in that Act and the later amending Acts. They are independent of the survival of the cause of action in or against the dead man, that is, in or against his personal representative. The purpose of these Acts was to abolish in a special and particular way the rule preventing the prosecution of a claim in tort for personal injuries where the person who would otherwise be plaintiff or defendant in an action has died. This rule was expressed in the maxim "actio personalis moritur cum persona." I do not intend to discuss the early history of this rule. No one has claimed that it is logical. The Legislature and the judges have from time to time limited its application, but have done so on the basis of convenience rather than of logic. One most important type of personal actions, those for breaches of contract, were long ago held to be outside its range, so that for personal wrongs of that character compensation for the benefit of the estate was recoverable just as if the plaintiff had not died. It was, however, settled that if in the case of what were called "purely" personal wrongs, a category which included torts of negligence causing personal injuries, the victim died before judgment the action abated, with the result that the wrongdoer escaped and the victim's representative received no compensation.

I have made these brief observations because they constitute all the extraneous matter which to my mind is necessary for the construction of the Act. I have stated, I think sufficiently, the existing law and the existing mischief in view of which the measure was enacted. No other extraneous considerations are either necessary or permissible. The words of the Act must with this introduction be construed as they stand.

The first sentence of s. 1, sub-s. 1, is perfectly general and is unqualified, save in so far as express limitations follow. These limitations must receive effect where they apply. But they also throw light on the general scope of the opening words. They identify certain wrongs which prima facie would have fallen within the Act, by expressly excluding them. Again, s. 1, sub-s. 2 (*c*), is especially significant, because it particularizes certain classes of losses and gains. It presupposes that damages may in general be calculated where death has been caused by the wrong, but excludes from the calculation losses or gains to the estate consequent on the death. I need not examine the full scope of this proviso, which is not directly material in this appeal. Obvious instances of what are referred to are such items as, on the one side, insurance moneys falling due on death, and, on the other, annuities ceasing on death. These are irrelevant to the question of what damages can survive, because the dead man could neither have collected such gains or experienced such losses. They are subsequent to and only remotely for present purposes connected with his death. Funeral expenses form a clear example of the same category. The claim now in question is by contrast one for personal injuries suffered by the deceased girl while alive. The provision I have just discussed is, however, material to meet the contention that where the wrong has caused death, damages for that wrong are only to be calculated after eliminating altogether the fact that death has been caused. I shall later discuss that contention more fully. It is enough here to say that it seems

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to contradict the unqualified words of s. 1, sub-s. 1, and also the implication of s. 1, sub-s. 2 (*c*). It is also, I think, incorrect to say that the Act creates no new rights. Sect. 1, sub-s. 5, in express terms refers to the rights conferred by this Act. The Act gives rights of survivorship where before the Act there was no such right. It gives a new right because it prevents a right from being extinguished. It is, however, true that the personal representative has no right but what the deceased if alive could have enforced.

The facts of this case are simple. Mabel Alice Rose was on August 4, 1934, injured in a collision between the motor-cycle combination in which she was riding as a passenger and a motor-car driven by the respondent. At the time of the accident she was a strong healthy girl of twenty-three years of age. She was very seriously injured, her right leg being fractured in two places. At the hospital on August 6 it was found necessary to amputate her leg as gangrene had set in. But the amputation was not successful and she died on August 8. The doctor gave evidence that the girl was conscious at times while in hospital but in a state of coma. It was not denied that the collision was due to the respondent's negligence.

The appellant, as administrator of the deceased girl's estate, issued a writ against the respondent. He claimed damages under the Fatal Accidents Acts on behalf of himself and his wife as dependants. He also claimed damages under the Act of 1934 as for a cause of action which had vested in the girl while alive and survived for the benefit of the deceased's estate. The action was tried before Humphreys J. without a jury. Liability was not denied, but the proper measure of damages was the subject of dispute. The judge awarded to the appellant 300*l.* under the Fatal Accidents Acts. Under the Act of 1934 he awarded 500*l.*, with 29*l.* 2*s.* 11*d.* for special damages, including hospital and funeral expenses. The appellant's counsel at the trial had claimed that the general damages should be calculated with reference to three elements, pain and suffering, loss of the leg, and shortening of expectation of life. The learned judge held that under the

Act the estate of the deceased person was entitled to recover any damages which the deceased herself could have recovered. He treated the damage under the Fatal Accidents Acts as a separate matter in virtue of s. 1, sub-s. 5, of the Act of 1934. He awarded general damages of 500*l.* to cover pain and suffering (which could not, he held, be serious or prolonged on the facts) and also loss of the leg, which he said was a permanent loss, to be regarded as a great deprivation and a cause of substantial damage. He seems to have proceeded on the view that the common law would take the infliction of the serious injuries which in a moment converted the girl from a healthy human being into a crippled wreck as a ground for substantial damages, whether she died or not. He rejected the claim for the shortening of the expectation of life based on the decision of the Court of Appeal in *Flint* v. *Lovell.* (1) His ground for doing so was that there was no evidence of mental suffering caused to the girl by the shortening of the expectation of life. This he regarded as the basis of that decision.

On appeal the Court of Appeal unanimously held that the elements of damage should be separately analysed and considered. The Court held that substantial damages could not be given for pain and suffering, as the girl lived only four days after the accident, or for the loss of the leg, as she lived only two days after the amputation. They awarded 20*l.* for the former and 2*l.* for the latter element of damage. But they differed on the question whether damages could in law be given in respect of the shortening of the expectation of life, though they all agreed that if such damages were allowable 1000*l.* was a proper sum. They all agreed also that the judge was wrong in thinking that the decision in *Flint* v. *Lovell* (1) rested on the victim's mental suffering caused by contemplating that her life was being shortened. But they differed on the question whether the loss of the opportunities of working and enjoying the normal period of life was admissible as an element of damage. Greer L.J. thought that it was because it was a head of damage vested

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in the deceased at the time of her death on the principles of *Flint* v. *Lovell*. (1) Slesser and Greene L.JJ. came to a different conclusion, holding that this element of damage should in law be excluded. They distinguished *Flint* v. *Lovell* (1) on the ground that the plaintiff there was a living person when the action was tried. Greene L.J. thus summed up his opinion (2) : " The principle laid down in *Flint* v. *Lovell* (1) is to be confined to cases where the injured person is still alive at the date of the action. It appears to me to be no more possible to disregard the fact of death in the case of the claim for damages for loss of expectation of life than it is in the case of the loss of the leg. The substance of the claim on the facts of the present case is, in my opinion, a claim by an administrator for damages for loss of the deceased's life and I do not think that it can be treated as a claim originally vested in a living person for damages for loss of expectation of life upon the principle of *Flint* v. *Lovell* (1)."

This way of looking at the case involves in my judgment a failure to give effect to s. 1 of the Act of 1934. The moment before the girl died there was, as I think, apart from her actual death a cause of action vested in her for deprivation or loss of expectation of life. Before the Act, that cause of action would have ceased with her death. That same cause of action, by force of the Act, now survives in the administrator. It is not correct to say that the administrator acquires under the Act a new or changed cause of action, as would be the case if he were a third party suing for the deceased's death. Obviously she could not have sued herself for her own death. The administrator simply stands in the shoes of the deceased, and in a sense may be said to continue her life. The damages for loss of expectation of life are indeed on a different footing from those for loss of the leg. The former damages are to be based on her state as a young and healthy woman with the use of both legs at the moment before she was struck down. If in addition she got damages for the loss of her leg for the period of the normal expectation of life, she would be getting pro tanto damages twice over. But on the view of the Court of Appeal the defendant would be in the paradoxical position of being entitled to plead in mitigation of damage that he had not merely maimed but killed the plaintiff. It was some such idea that before the Act of 1934 inspired the cynical comment that it was cheaper to kill than to maim or cripple. The Act has, however, not merely stated that it is amending the law as to the effect of death in relation to causes of action, but has done so. The fact that the plaintiff has died before judgment is now in truth an irrelevant circumstance, save that it obviates to some extent the necessity of medical evidence that the accident has shortened the person's life. The damage claimed is not for the death, for which the victim herself could not have sued, any more than the administrator can who merely stands in her shoes. I venture respectfully to think that the view of the Court of Appeal illustrates a tendency common in construing an Act which changes the law, that is, to minimize or neutralize its operation by introducing notions taken from or inspired by the old law which the words of the Act were intended to abrogate and did abrogate.

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(1) [1935] 1 K. B. 354.

(2) [1936] 1 K. B. 110.

A similar tendency is illustrated, I think, by the references to a dogma of somewhat obscure import and uncertain application, that in a civil court the death of a human being cannot be complained of as an injury. For reasons already stated that is not what is complained of here by the administrator, any more than it would or could have been complained of by the girl if alive at the date of trial. But I shall discuss this point more fully later.

In passing I shall seek to eliminate a possible source of confusion tentatively touched on in the judgment of Slesser L.J. by very briefly adverting to the question of felony in relation to the girl's death. There is indeed here, it is admitted, no reason to suggest that the negligence of the defendant which caused the girl's death was felonious. In any event, whatever the old law may have been, the modern law is quite clear that if the act complained of constitutes a felony, the civil remedy is not drowned but merely suspended. But, however limited, the rule that the plaintiff must first prosecute in a

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case of felony is an anachronism now that the police prosecute or are assumed to prosecute in every case of probable felony. Nor do I see how it can ever be alleged in any case where a person has been killed by negligence in driving a motor-car or by any other negligence that the act is felonious, unless and until the jury have so decided. No pleader would, I imagine, go out of his way to allege felonious negligence.

I can now deal with the argument strenuously pressed by Sir William Jowitt that *Flint* v. *Lovell* (1), which bound the Court of Appeal, was wrongly decided. If it was, it becomes irrelevant whether at the time of the trial the injured party is living or dead. Damages for loss of expectation of life or for shortening of life, it is said, cannot in law form an admissible element of damage. In *Flint* v. *Lovell* (1) the facts, very briefly stated, were that the plaintiff was at the date of the trial living. He was awarded 4400*l.*, as damages for injuries sustained owing to the defendant's negligence, by Acton J., who tried the case without a jury. In enumerating the circumstances which he took into account in assessing the damages, the judge found that the plaintiff's life would be materially shortened, that he was not expected to live more than a year, that he had lost the prospect of an enjoyable, vigorous and happy old age. Such was the medical evidence, which, like other sworn evidence, may have been mistaken; but if the injured party died before the trial that doubt on the facts would at any rate be excluded. The defendant on appeal objected that the amount awarded was excessive because among other reasons the judge had included that particular element of damage. The Court of Appeal unanimously upheld the judge on that point of principle.

I think their decision was right. I accept here the statement of Parke B. in *Armsworth* v. *South Eastern Ry. Co.* (2), used perhaps in a somewhat different context, that a man has a legal right in his own life. I think he has a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts not only in regard to pain, suffering and disability, but in regard to the continuance of life for

(1) [1935] 1 K. B. 354.

(2) 11 Jur. 758.

its normal expectancy. A man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given. It is true that it has been considered that it is impossible to form an estimate of the value of human life whether to the man himself or to others connected with him, to quote again the words of Parke B. in *Armsworth's* case. (1) But in that very case Parke B. was directing the jury to award damages under Lord Campbell's Act. It was the first case under that Act and Parke B. did not, it seems, appreciate the precise limits which were subsequently to be fixed for assessing the damages claimable by dependants. He seems to have directed the jury as if they were to award general damages for loss of the deceased man's life. He warned them that they could not give an exact compensation, which, he said, was impossible just as much as in the case of loss of limb or a wound; they were not to consider the value of existence as if bargaining with an annuity office, but were to calculate all accidents and give a fair compensation.

This direction might, it seems to me, in principle be applied to a case where a man's life has been wrongfully shortened and damages are claimed under the Act of 1934. It answers the objection that it is impossible to put a value on human life. In the case under appeal here, all the members of the Court of Appeal were able to fix on 1000*l.* as a fair compensation for shortening of life. Acton J. was able to include some sum in the damages awarded in *Flint* v. *Lovell.* (2) In one sense it is true that no money can be compensation for life or the enjoyment of life, and in that sense it is impossible to fix compensation for the shortening of life. But it is the best the law can do. It would be paradoxical if the law refused to give any compensation at all because none could be adequate.

I do not think it can be said that the idea of taking this element of damage into calculation is novel. Acton J., a very experienced judge, took it into account as a matter of

(1) 11 Jur. 758.

(2) [1935] 1 K. B. 354.

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course. I observe in the summing-up of Field J. to a special jury in *Phillips* v. *London and South Western Ry. Co.* (1) the judge refers specifically to the plaintiff's "prospect of a speedy death" as a matter which the jury were entitled to take into account. I remember in my own experience while a judge of assize at Manchester, some years before 1934, in a personal injuries case that an element of damage of this nature was left to the jury without objection, even though the plaintiff was kept in ignorance that his life was being seriously shortened by cancer supervening on the injury. Your Lordships in argument were referred to two Scotch authorities. In *Reid* v. *Lanarkshire Traction Co.* (2) Lord Sands, after putting the fanciful case of a Chinaman bartering for a price to induce him to commit suicide, in which case he would be compensated for loss of life, by having money to leave, observed that it was proper to leave to the jury the matter of shortening of life as an element to be taken into consideration in measuring the damage suffered by the deceased and to leave it to them, without any strict analysis of the content of the idea, to assess them in a moderate way. He added that the doctrine of award in respect of shortening of life was now matter positivi juris irrespective of any question of the sufferer's state of mind. In an earlier case, *M'Enaney* v. *Caledonian Ry. Co.* (3), Lord President Inglis and Lord Adam both referred to shortening of life as an element of damage. In both these cases the injured man had died before the trial, but the circumstances were such that by Scots law, which is different from English in this regard, the action by the representative was competent.

I think both on principle and on authority this element of damage, that is, for the shortening of life or for the loss of the normal expectancy of life, was properly taken into calculation in *Flint* v. *Lovell* (4), and should be considered here, as Greer L.J. thought. The jury should be directed that they are entitled to take it into consideration, along with other relevant elements of damage, using their common sense

(1) 5 Q. B. D. 78.
(2) 1934 S. C. 79.
(3) 1913 S. C. 838.
(4) [1935] 1 K. B. 354.

to give what is fair and moderate, in view of all the uncertainties and contingencies of human life. Special cases may occur, such as that of an infant or an imbecile or an incurable invalid or a person involved in hopeless difficulties. The judge or jury must do the best they can in the circumstances in this as in other cases. The precedents cited above show that an assessment can be made.

These considerations seem to me to dispose of the appeal in the appellant's favour, but I must briefly advert to arguments based on the decision of this House in *The Amerika* (1), or perhaps rather to dicta to be found in it. In that case, as Lord Sumner pointed out (2), the maxim "actio personalis moritur cum persona" was irrelevant because the maxim relates to the death of one of the parties to the action (the "persona") whereas in *The Amerika* (1) both plaintiff and defendant were alive. The Admiralty had claimed to include in their damages consequent on a collision for which the owners of the *Amerika* were liable, sums which they had paid to the relatives of seamen drowned in the collision by way of pensions. One sufficient ground on which this House disposed of that claim was that the payments were voluntary and hence did not directly flow from the collision but were too remote. But in addition their Lordships dealt with an alternative defence—namely, that the law did not allow damages in favour of a plaintiff resulting from the death of a third party caused by the negligence for which the defendant was liable, as, for instance, damages for loss of service in the case of master and servant or of consortium in the case of husband and wife, or pensions. I need not discuss the judgments on this point given by Lord Parker and Lord Sumner or the criticisms which have been passed upon them. It is enough to say that, just as the maxim "actio personalis" was irrelevant to the case, so is the case irrelevant to a discussion of actio personalis and in particular to a discussion of the effect of the Act of 1934 which abolishes the maxim. But it is said that this House approved of the rule in *Baker* v. *Bolton.* (1) In that case Lord Ellenborough is reported to have said that "in a civil court the death of a human being could not be complained of as an injury." These words, it was contended, have the same sanctity and universality of application as if they were to be found in an Act of Parliament of general scope. But it may be noted this House did not in *The Amerika* (2) disapprove of *Jackson* v. *Watson & Sons* (3), where the Court of Appeal held that a husband was entitled to recover damages resulting from the death of his wife, due to the defendants' breach of contract. That was clearly a case in which the death of a human being was successfully complained of as an injury. It was sought to limit the rule of *Baker* v. *Bolton* (1) by saying that it only applied where death is an essential part of the cause of action. But in the case of a tort like the present, though the cause of action requires both injuria and damnum, there is, apart from the death, damage sufficient to found the action. Reliance was further placed on the words of recital to Lord Campbell's Act: "Whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another." These words, together with the statement of the rule by Lord Ellenborough in *Baker* v. *Bolton* (1), were sufficient, it was contended, to establish a general rule of law sufficient to defeat the plaintiff's claim in this action, because the injured girl had died in fact as a result of the defendant's negligence. But I think the recital in Lord Campbell's Act is no more relevant here and no more universal in its application than Lord Ellenborough's statement of principle. As Lord Sumner pointed out in *The Amerika* (4) the preamble to the first section of Lord Campbell's Act should be read as applying to the particular defect in the existing law which it was passed to remedy—namely, the disadvantageous position of widows and children. This limited view of the recital agrees with that expressed by Bramwell B. in his powerful dissenting judgment in *Osborn* v.

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(1) [1917] A. C. 38. (2) Ibid. 60.

(1) 1 Camp. 493.
(2) [1917] A. C. 38.
(3) [1909] 2 K. B. 193.
(4) [1917] A. C. 38, 51.

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Gillett. (1) I do not regard these authorities or others, which I need not here quote, to the same effect, as of any application to the problem involved in this case for several reasons. The observations in these authorities were all directed to cases where a living person was suing another living person for damages caused by the death of a third person. It was not indeed, even before the Act of 1934, pertinent or even sensible to refer to the case of a man suing for his own death. Literally, not the common law, but the law of nature, prevented that being even imagined. Further, the maxim " actio personalis " prevented the executor from suing for damages in tort for the death or indeed for personal injuries anterior to the death even though the death was subsequently and independently due to a separate cause. But the Act of 1934, in changing the law, has made it competent to sue for any cause of action actually vested in the deceased man at the moment of death. Natural reasons still operate to prevent a man from suing for his own death. But he can sue so long as he lives for the injury caused to him by shortening his life or depriving him of his normal expectancy of life. Such causes of action vest in him before he dies, and under the Act of 1934 they survive if he dies before an action is commenced or judgment is given. They are in truth wholly independent of the killing of the deceased per se if I may quote the language of Bowen L.J. in *The Vera Cruz* (*No.* 2). (2) They involve an entirely different concept from the concept of the mere fact of death.

One other point I ought to mention. It is said that, if this element of damage is allowed, there may be a risk of duplication of damages in particular because the Act of 1934 by s. 1, sub-s. 5, provides that the rights conferred by the Act shall be in addition to, and not in derogation of, rights conferred on dependants by the Fatal Accidents Act or other like Acts. If the Act necessarily involved this consequence, it would all the same have to be enforced. But in my opinion the Act does not. I think that in practice no duplication of damage need occur. I think the jury would be properly directed to take into account either that they were at the same time

(1) (1873) L. R. 8 Ex. 88, 95.

(2) (1884) 9 P. D. 96, 101.

giving damages under Lord Campbell's Act as they did here, or that such damages had been or might be given. The object of damages in these cases is compensation for the benefit of the estate. It is true that the claims under Lord Campbell's Act are independent and are for the separate pecuniary loss sustained by the dependants, whereas the damages under the Act of 1934 go into the general estate in which quite different persons, creditors, legatees, or other beneficiaries, may be interested. But one of the fruits of continued life is generally provision for dependants. If that provision is made good by awards under the Fatal Accidents Acts, the loss consequent on the shortening of life may be deemed to be pro tanto reduced. The award of damages in the present case shows how duplication may be avoided. This matter can fairly be left to the good sense of the jury or judge.

To conclude, I think the appeal should be allowed.

LORD ROCHE. My Lords, I agree that this appeal should be allowed and that the plaintiff should have judgment for 1000*l*. in addition to the sum he recovered under the judgment of the Court of Appeal.

I can the more easily make my reasons for this opinion clear if I first make some observations as to the case of *Flint* v. *Lovell* (1) and as to my own judgment in that case. I dissented from the conclusion of the majority of the Court only on the ground that the amount awarded to the plaintiff by the trial judge was in my opinion so excessive that it ought to be reduced by the Court of Appeal. On the point that is material to the case now before your Lordships—namely, whether a shortening of the expectation of life due to the accident was proper to be taken into account as a head or element in the damage, I agreed with the majority of the Court though with certain doubts which I thought it right to express.

Thinking as I still do that the case of *Flint* v. *Lovell* (1) was not rightly decided on the facts, and in particular that

(1) [1935] 1 K. B. 354.

this element of damage, admissible though it was, was too amply allowed for in money I am unable to say that I think the actual decision in that case was correct. My view on the facts was perhaps confirmed by the information given to the House by counsel as a matter of interest that Mr. Flint was fortunately still alive to-day. But upon the only topic now of importance, namely the question of principle decided in *Flint* v. *Lovell* (1), I have been satisfied by the full discussion of the matter before and by your Lordships that the decision was right and that the considerations which gave rise to my doubts are of insufficient force to debar the plaintiff from his remedy here. As regards the reasons assigned by the majority in the Court of Appeal for holding that, in the present case, accepting as they were bound to do the decision in *Flint* v. *Lovell* (1) as correct, still the plaintiff was not, owing to the death of Mabel Rose, entitled to recover the damages now in question, I am of opinion that those reasons are not well founded in law.

My grounds for these conclusions are as follows :—

The rule of law which was laid down by Lord Ellenborough in 1805 in *Baker* v. *Bolton* (2) and reaffirmed in this House in *The Amerika* (3) is formulated, and I think correctly formulated, in the preamble to Lord Campbell's Act in the following language : " No action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person " and by Kennedy L.J. in *Jackson* v. *Watson & Sons* (4) in similar language. "Where," said the Lord Justice, who was of course speaking of matters other than those covered by statutes such as Lord Campbell's Act—" a person's death has been caused by the actionable conduct of another, ... no one, whatever his connection with the deceased may be, can maintain an action of tort for damage resulting to himself from the death." This rule, it may be added, is clearly not abrogated by the Law Reform Act, 1934, which indeed in s. 1, sub-s. 2 (*e*), seems to reaffirm it with the express exclusion from its operation of claims for funeral expenses. The historical origin of the rule and questions as to its utility and reasonableness have been much and even hotly debated. I have no inclination to contribute anything to these discussions or to do otherwise than to recognize that the rule is there and binds your Lordships. It is enough to make sure what is the scope of the rule and what are the limits of its application. In my judgment it clearly only applies to actions by persons other than the person whose life or death is in question. In this connection it is to be observed that while probably there are more reasons than one for the existence of the rule, one reason which is given by no less an authority than Parke B. in *Armsworth* v. *South Eastern Ry. Co.* (1) is that "a man has not such a legal right in the life of his parent as he has in his own." The same reasoning would apply to persons other than parents.

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(1) [1935] 1 K. B. 354.
(2) 1 Camp. 493.
(3) [1917] A. C. 38.
(4) [1909] 2 K. B. 193.

Such being, in my view, the scope of the rule, is the present action within that scope? I think it is not, for the reasons admirably expressed by Greer L.J. (2) He thought that by reason of the statute, i.e., the Law Reform Act, 1934: "It is beyond dispute . . . . that the personal representative can recover the damages which could have been recovered by the deceased and which were a liability on the wrongdoer at the date of the death. It is to be observed that the cause of action vested in the deceased was not her death, nor had she a separate cause of action for each item of damage. The cause of action was negligence causing damage and it seems clear to me that all items of damage suffered by her are recoverable by her administrator by reason of the survival of the cause of action, now vested in the plaintiff as her administrator." Thus the cause of action is the cause of action not of a stranger to the deceased but of the deceased herself when alive. As to this cause of action the statute renders inoperative the maxim "actio personalis moritur cum persona" and on her death this cause of action survived and could be enforced by the plaintiff. So also it is of importance to note what is the essential nature of that cause of action.

(1) 11 Jur. 758.

(2) [1936] 1 K. B. 99.

As Greer L.J. pointed out with complete accuracy in the passage quoted above the cause of action is not the deceased's death but damage before death. In the days when forms of action were of moment, the appropriate form of action for the deceased to avail herself of in her lifetime would have been either trespass (to the person) or case. To-day the action is ordinarily and conveniently styled an action for personal injuries caused by negligence—injuries in this connection meaning of course not legal wrongs but bodily hurts. Though it may be both convenient and proper, at the stage of the inquiry to be reached when the money assessment of the damage is taken in hand, then to concentrate on the effect of the injuries on the expectation of life, yet it is no less proper at this stage to recognize that it was the injuries or bodily hurts of the deceased which with the negligence made and completed the deceased's cause of action, and that amongst those injuries was the pathological or traumatic condition of her body which set up and caused infection and gangrene. The gist of such a cause of action both in modern and olden times has been considered and defined in connection with pleas of res judicata to meet claims for personal injuries: see *Brunsden* v. *Humphrey* (1) and of the old cases *Fetter* (or *Ferrer*) v. *Beal*. (2) In the latter case the plaintiff had sued and recovered a modest sum for damages for battery constituting trespass to the person. Subsequently a piece of his skull which, unknown to him, had been loosened by the battery fell out, but as he had recovered damages once he could not recover again. So here the deceased's death added nothing to the cause of action but was merely evidence of the gravity of the injuries and of the extent to which her expectation of life was diminished owing to such injuries. There was called to your Lordships' attention a note on the decision in *Flint* v. *Lovell* (3) under the initials of that great and much lamented lawyer Sir Frederick Pollock (Law Quarterly Review, vol. 51, p. 268). This note is very succinct and is thereby rendered a little obscure, but I take the comment to be in line with what I have tried to express—namely, that it is theoretically wrong in such a case to start from death as shortening life, but right to start with the initial bodily injuries carrying with them from the outset a diminished expectation of life which sooner or later will end with death. On this analysis of the cause of action of the deceased and of the plaintiff I am impelled to the conclusion that this cause of action is not within, and is not touched by, the rule of law laid down in *Baker* v. *Bolton* (1) and *The Amerika.* (2) This does not mean that I am not acutely sensible of an apparent contradiction or inconsistency of principle between that rule of law and the existence of the right to the damages now in question; but on a consideration of that matter I am unable to see that it is the duty or the right of your Lordships, sitting in a judicial capacity, either to enter upon a task of rendering the law uniform and consistent where lack of uniformity or of consistency may manifest itself at present, or for the sake of uniformity to extend the rule to cases and circumstances not actually within its scope.

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(1) (1884) 14 Q. B. D. 141.

(2) (1697) 1 Ld. Raym. 339, 692.

(3) [1935] 1 K. B. 354.

I now pass to a consideration of the other objections raised against the plaintiff's claim to the 1000*l.* for diminution of the deceased's expectation of life. The ground of the decision in the Court of Appeal seems to be, as Slesser L.J. expresses it, that on the death the defendant's wrongful act became a felony and that the right of action became merged in the felony, or, as Greene L.J. expresses it more broadly, that it is not possible to disregard the fact of death and that the substance of the claim is in his opinion a claim by an administrator for damages for loss of the deceased's life which cannot be treated as a claim originally vested in a living person for damages for loss of expectation of life upon the principle of *Flint* v. *Lovell.* (3)

There is in fact no evidence that the defendant was guilty of a felony in the way he drove. The claim in the action is based upon negligence only and at the trial liability was admitted on that basis. Your Lordships were informed by counsel in answer to a question that the defendant, so far as criminal proceedings were concerned, had been dealt with not for manslaughter or dangerous driving but for careless driving, which is not a felony or even an indictable offence. As to the broader ground of objection I have endeavoured to show what I conceive the cause of action to be and that on the facts and the true construction of the statute—Law Reform (Miscellaneous Provisions) Act, 1934—the cause of action is what Greer L.J. held it to be and not what Greene L.J. held it to be. Indeed, on the latter view, I think the action ought to have failed altogether and not to have succeeded even to the limited extent allowed by the judgment of the Court of Appeal. I would add one other observation in this connection. If *Flint* v. *Lovell* (1) is right in principle, then, in my view, death makes no difference whether it is due to a defendant's wrongdoing or to some extraneous and different reason. In the latter case would it be contended that the cause of action was gone? I think not. In the former case it would, I think, be an extension of the rule as to killing not being actionable to hold that killing extinguished or merged in itself a subsisting right of action for inflicting bodily hurt. It would certainly give to a wrongdoer an advantage from his own wrong. Greene L.J. also thought that just as the fact of death was used to reduce the amount awarded at the trial and expressed to be for the loss of the leg, so also it should be used in respect of the claim for loss or diminution of the expectation of life. But there is in my opinion no real analogy between these two cases. The reduction by the Court of Appeal of the trial judge's award of 500*l.* for the loss of the leg was justified not on this ground but on a different ground—namely, that once adequate damages had been given for loss of expectation of life, i.e., for shortened life, then to give other damages for physical injuries on the basis of a life of normal length would be to give them twice over.

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(1) 1 Camp. 493.
(2) [1917] A. C. 38.
(3) [1935] 1 K. B. 354.

There remains the argument advanced before your Lordships based on the view that the matter of expectation of life ought to be regarded only subjectively, that is to say, as it bore

(1) [1935] 1 K. B. 354.

upon the question of an injured person's mental anxiety or pain and suffering. This was the ground of Humphreys J.'s decision on this point. He apparently thought that this was the ground of the decision in *Flint* v. *Lovell* (1), and MacKinnon J., in *Slater* v. *Spreag* (2), appears to have thought the same. The learned judges were mistaken as to the ground of the decision in *Flint* v. *Lovell*. (1) All the Lords Justices held the contrary. I think they were right, and that the subjective ground ought not to be the sole ground upon which this element or consideration is to be taken into account. I regard impaired health and vitality not merely as a cause of pain and suffering but as a loss of a good thing in itself. Loss of expectation of life is a form in which impaired health and vitality may express themselves as a result. In such a loss there is a loss of a temporal good, capable of evaluation in money though the evaluation is difficult. Parke B. in *Armsworth* v. *South Eastern Ry. Co.* (3), in a passage cited by Greene L.J., said that "it was considered impossible to form an estimate of the value of human life." I respectfully do not agree that it is impossible, though it is doubtless difficult. Damages frequently have to be estimated in a case such as the following: a person suffers physical injuries of a nature to prevent him or her from living as full and complete a life as before, not in the matter of earning power but in the matter of performing the functions and reaping the enjoyments of a normal life. An analogous problem is now presented. In the case I have outlined partial loss of the good of life over the normal period of life has to be measured: here a total loss of the good of life over part of the normal period of life has to be measured. I do not doubt that the measurement can be made.

Nevertheless, it is this question of the assessment of damages which gives me more anxiety than any other part of this case, and I venture to make some further observations upon this aspect of the matter. I am very conscious that this discussion leads into paths of abstruse thought and technicalities of the law far remote from the practical directions which judges will have to give to themselves and to juries for the purposes of determining questions of amount. But when the task of giving such directions has to be undertaken, abstruse thought and technicalities can be left behind, and as a starting-point there can be taken the simple fact that in a proper case this is an element of damage which ought to be taken into account. I derive assistance as to the method of proceeding from that point from two sources. The first source is certain decisions of the Courts of Scotland which were cited in argument here but which are helpful rather on the question of damages than on the question of principle, because the law of Scotland is not troubled with the same rule as the *Baker* v. *Bolton* (1) rule. The second source is the method adopted by the Court of Appeal in the present case. The Scottish decisions to which I would refer are: *Macmaster* v. *Caledonian Ry. Co.* (2), in which a court presided over by Lord President Inglis dealt with the matter of a shortened life both from an objective and subjective point of view, and *Reid* v. *Lanarkshire Traction Co.* (3) In the latter case Lord Sands, dealing with a similar matter, said: "Still there is something in it which I confess puzzles me, once it is conceded that a man is entitled to compensation for the shortening of his life. But the matter is so hedged with metaphysics that, were I charging a jury, I think I should be disposed to be content to tell them that the shortening of life was an element which they were entitled to take into consideration in measuring the damage suffered by the deceased, and to leave it to them, without any strict analysis of the content of the idea, to assess the damages, contenting myself with warning them that the weight to be given to this element must be moderate, and they must not consider what price the man would have put upon his life." I also should be very content with a direction such as this; but it might be supplemented with advice as to how to proceed in such a manner as the Court of Appeal proceeded here. The effect of what the Court of Appeal

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(1) [1935] 1 K. B. 354.

(2) [1936] 1 K. B. 83.

(3) 11 Jur. 758, 759

(1) 1 Camp. 493.
(2) (1885) 13 R. 252.
(3) 1934 S. C. 79.

has done as to amount is this: As Greer L.J. has said there is not a question of a separate cause of action for each item of damages; but it is customary in order to arrive at a lump sum, which is to constitute the judgment or verdict, to direct attention to and quantify various items or elements of damages such as pain and suffering, loss of earnings during incapacity and permanent disablement if any. Accordingly in the present case it was quite correct, where obviously the principal element was that the expectation of life was cut down so greatly, to treat that as the main matter. That element was quantified at an amount which seems to comply with Lord Sands' recommendations, and it was obviously and rightly arrived at without regard to the question of the amount of future earnings and solely on the basis of what was life going to be worth to a healthy young woman earning her own living, with dependent parents and with some prospects of marriage. This method seems to me to be correct. It eliminates, and rightly so, the question of rich and poor, and pays regard to the normal and the average. A rich miser living in squalor or a very poor man deeply sunk in misery might require special treatment; but ordinarily a person may be assumed to have or be able to earn enough to live his or her life and to enjoy it. Earnings or income are otherwise and to an extent beyond this irrelevant. This having been done it was justly said that the pain and suffering were slight in the circumstances and that the other injuries and in particular the loss of the leg were in effect swallowed up in the estimates made for the first and main element. Clearly in other cases the relative importance of these several elements might be very different and would receive the appropriate explanation. But the building up of a whole sum out of several items or elements is both in accordance with general practice and in accordance with the method adopted in this House in the case of *The Liesbosch* (1), where the problem was to ascertain the value of a vessel to its owner as a going concern.

I would add that I confess to some apprehension lest this element of damage may now assume a frequency and a prominence in litigation far greater than is warranted in fact, and becoming common form may result in the inflation of damages in undeserving cases, or, more probably perhaps, may become stale and ridiculous to the detriment of real and deserving cases, such as the present. But the abatement of these possible evils may be left to the good sense of judges and juries, and I may be permitted to express the hope that the assistance of a jury—in my judgment a most admirable tribunal for such a purpose—may be not seldom availed of in the future.

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(1) [1933] A. C. 449.

For these reasons I would allow the appeal as to the sum of 1000*l.* and I have nothing to say as to the award of 300*l.* under Lord Campbell's Act save that this was the proper place to deal with the deceased's future earning power cut off by death, and that accordingly there was no clashing or overlapping as between the two causes of action and the judgments thereunder.

Appeal allowed; the order of Humphreys J. varied by increasing the sum awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, *to* 1022*l.*, *and judgment to be entered for the appellant for* 1351*l.* 2*s.* 11*d.*

Solicitors for appellant: *Vizard, Oldham, Crowder & Cash, for Cross, Son & Hodgetts, Evesham.*

Solicitors for respondent: *Berrymans.*

GALLAGHER . . . . APPELLANT; H. L. (N. I.)*

AND 1937

LYNN . . . . RESPONDENT. *June* 10, 11; *July* 19.

Ireland—Act of Parliament of Northern Ireland—Act regulating supply of milk—Incidentally precluding dairy farmers outside Northern Ireland from sending milk into Northern Ireland—Competency—Milk and Milk Products Act (Northern Ireland), 1934 (24 *&* 25 *Geo.* 5, *c.* 16)—*Government of Ireland Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 67), *s.* 4.

The Milk and Milk Products Act (Northern Ireland), 1934, is not a statute "in respect of" trade within the meaning of s. 4, sub-s. 7, of the Government of Ireland Act, 1920, but is an Act for the peace, order and good government of Northern Ireland "in respect of" precautions for the securing of the health of the inhabitants of Northern Ireland by protecting them from the dangers of an unregulated supply of milk. The Act was therefore within the competence of the Parliament of Northern Ireland to enact, though its provisions preclude a person whose premises are outside Northern Ireland from obtaining a licence for the sale of Grade A, B or C milk in Northern Ireland.

If, in considering whether a statute is within the competence of a subordinate Legislature to pass, it is found that the substance of the legislation is within the express powers, it is not invalidated merely because incidentally it affects matters which are outside the authorized field. The legislation must not, however, under the guise of dealing with one matter encroach upon the forbidden field.

Decision of Court of Appeal of Northern Ireland (reported sub nom. *Rex* v. *Gallagher* [1936] N. I. 131) affirmed.

APPEAL from a decision of the Court of Appeal of Northern Ireland. (1)

The appellant was a dairy farmer in the county of Donegal, in the Irish Free State, where for many years he had carried on business and had been selling milk by retail in the city of Londonderry for human consumption, and since the imposition of Customs duty on milk imported into Northern Ireland he had paid the appropriate duty on the milk so brought in by him.

By s. 1, sub-s. 1, of the Milk and Milk Products (Northern

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD MAUGHAM.

(1) Reported sub nom. *Rex* v. *Gallagher* [1936] N. I. 131.

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Ireland) Act, 1934, passed by the Parliament of Northern Ireland, it was provided that " a person shall not, either by himself or by any servant or agent . . . . (*c*) sell or offer or expose for sale any milk except under and in accordance with this Act and such licence, if any, as may be required under this Act," and by s. 1, sub-s. 6, it was provided that " milk shall not be sold or offered or exposed for sale for the purpose of human consumption unless it is milk of Grade A, Grade B, or Grade C." By s. 2, sub-s. 1, it was provided that " a person shall not sell milk of Grade A, Grade B or Grade C unless he holds a licence under this section, being either (*a*) a Producer's licence, that is to say, a licence for the production and sale of milk ; or (*b*) a Distributor's licence, that is to say, a licence for the purchase and resale of milk, whether by wholesale or by retail " ; and by sub-s. 2, " the Ministry of Agriculture shall, on application being made in the prescribed manner, and on payment of the appropriate fee specified in this section, grant to any person upon the prescribed conditions a licence under this section."

After the passing of the Act the appellant applied for, but was refused, a Producer's licence under the Act so as to enable him to continue to sell in Londonderry milk for human consumption produced at his dairy in the county of Donegal. The licence was refused by the Ministry of Agriculture on the ground that licences under the Act could be granted only to persons whose dairies where the milk was produced were situate in Northern Ireland. Licences were also refused to other dairy farmers for the same reason.

As the appellant sold milk in Londonderry without having obtained a licence under the Act, proceedings were taken against him and he was convicted, and on appeal that conviction was upheld. At the hearing of the appeal it was contended (inter alia) that the Milk Act, 1934, was ultra vires as being an undue interference with trade and so in violation of s. 4 of the Government of Ireland Act, 1920, which provides that " Subject to the provisions of this Act . . . . the Parliament of Northern Ireland shall . . . . have power to make laws for the peace, order, and good government of . . . .

Northern Ireland with the following limitations, namely, that they shall not have power to make laws except in respect of matters exclusively relating to the portion of Ireland within their jurisdiction, or some part thereof, and (without prejudice to that general limitation) that they shall not have power to make laws in respect of the following matters in particular, namely . . . . (7) Trade with any place out of the part of Ireland within their jurisdiction, except so far as trade may be affected by the exercise of the powers of taxation given to the said Parliaments, or by regulations made for the sole purpose of preventing contagious disease, or by steps taken by means of inquiries or agencies out of the part of Ireland within their jurisdiction for the improvement of the trade of that part or for the protection of traders of that part from fraud," and the section further provided that "any law made in contravention of the limitations imposed by this section shall, so far as it contravenes those limitations, be void."

The Court of Appeal of Northern Ireland held (*a*) that the word "person" in s. 1, sub-s. 1, of the Milk Act, 1934, applied to all producers irrespective of the place of production, and that the word "milk" must be interpreted in the same way; and (*b*) that the primary object of the Milk Act, 1934, was not interference with trade, and therefore that the Act did not come within the limitation imposed by s. 4, sub-s. 7, of the Government of Ireland Act, 1920.

The appellant by leave appealed to this House.

J. M. Whitaker (of the English Bar and K.C of the Irish Bar) and *Cyril A. Nicholson* (of the Irish Bar) for the appellant. It is submitted that the Milk and Milk Products Act, 1934, cannot be construed as having any application outside Northern Ireland. If, however, it is to be so regarded, it is ultra vires as it involves a violation of s. 4, sub-s. 7, of the Government of Ireland Act, 1920, which precludes the Parliament of either Northern Ireland or Southern Ireland from making laws in respect of, inter alia, "trade with any place out of the part of Ireland within their jurisdiction." The Act of 1934 clearly prohibits any person in the Irish Free State sending milk into Northern Ireland; that clearly is legislation in respect of trade, and, as such, is invalid. In this connection it has to be borne in mind that one of the objects of the Government of Ireland Act, 1920, was to prevent anything that might militate against the eventual unification of the whole of Ireland; and this legislation will operate directly against this being effected. The Parliament of Northern Ireland is a subordinate legislature and can only act strictly within the powers conferred upon it: *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1); *In re Insurance Act of Canada* (2); *Attorney-General for British Columbia* v. *Attorney-General for Canada.* (3) Alternatively, the Act is invalid as discriminating in trade against those outside Northern Ireland: *Fox* v. *Robbins.* (4) The origin and not the quality of the milk is improperly set up as the test by the Northern Ireland authorities.

Sir Anthony Babington K.C. (Attorney-General for Northern Ireland), *J. C. MacDermott K.C.* and *Gerald Dougherty* (all of the Irish Bar) for the respondent. By the Government of Ireland Act, 1914, precisely the same power was conferred by s. 2 on the Irish Parliament, namely, power to legislate " for the peace, order and good government of Ireland " as is conferred by s. 4 on each Irish Legislature by the Act of 1920, and the Parliament of Northern Ireland in passing the Milk and Milk Products Act was clearly acting within the powers conferred upon it. In effect the Act says this: we desire to ensure a supply of clean and good milk for the people of Northern Ireland—a supply whose production we can supervise by our inspectors; and this cannot be done with regard to premises in Donegal. As was said in *Russell* v. *The Queen* (5), what has to be regarded is the true nature and character of the legislation, and that obviously in the case of the Milk Act, 1934, is to ensure a pure milk supply. *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1) does not support the contention of the appellant. Although it was there held

(1) [1929] A. C. 260.
(2) [1932] A. C. 41.
(3) [1937] A. C. 377.
(4) (1909) 8 C. L. R. 115.
(5) (1882) 7 App. Cas. 829, 839.

that the Provincial Legislature had invaded the rights of the Dominion, it was not said that a mere incidental effect would colour the whole legislation: see also to the like effect *Lymburn* v. *Mayland.* (1)

Whitaker K.C. in reply. *Lymburn's* case (1) supports the view for which we contend.

The House took time for consideration.

1937. July 19. LORD ATKIN. My Lords, this is an appeal from an order of the Court of Appeal of Northern Ireland dismissing an appeal from the Recorder of Londonderry who on appeal affirmed a conviction of the appellant by the justices for the County of the City of Londonderry for selling milk in the city of Londonderry without a licence in contravention of s. 1, sub-s. 1 (*c*), of the Milk and Milk Products Act (Northern Ireland), 1934. The appeal to the Court of Appeal was brought under s. 50 of the Government of Ireland Act, 1920, and was brought in this House by leave of this House. The case involves a question as to the construction and validity of the Milk and Milk Products Act passed by the Legislature of Northern Ireland in 1934. I need not set out verbatim the material provisions of the Act. They provide that a person shall not sell milk except under and in accordance with the Act (s. 1, sub-s. 1 (*c*)); that a person shall not sell milk of Grade A, B or C (defined by the Act) unless he hold either a producer's or a distributor's licence (s. 2, sub-s. 1); that the Ministry of Agriculture shall, on application made in the prescribed manner, grant to any person upon the prescribed conditions a licence and that the holder of a licence shall keep milk records and furnish such returns as the Ministry may require and permit the records to be inspected by an authorized officer (s. 2 (6)). The Act further provided that an authorized officer should have power to enter and inspect at any reasonable time any part of the land or possessions occupied by the holder of a licence in connection with his business and examine milk found there and take samples (s. 8, sub-s. 1). Power to make regulations is given to the Minister by s. 9, sub-s. 1.

(1) [1932] A. C. 318.

Regulations governing the production and sale of milk of Grade C quality were made by the Minister on August 24 (S. R. and O., Northern Ireland, 1934, No. 71). They provide that a producer shall permit any authorized officer at any reasonable time to inspect the herd and examine all premises and equipment used by the producer in connection with the production or sale of milk (Reg. 5) and contain other provisions as to things to be done and powers to be exercised on the premises (Regs. 6, 7, 8, 9); and a regulation that the Minister before granting a producer's licence shall satisfy himself that the applicant's arrangements for dealing with milk, i.e., arrangements for the production, handling, storage, treatment, and distribution of milk, are such as will enable him to comply with the provisions of the Act and Regulations (Reg. 22 (*i*) and (4)).

The appellant is one of several farmers whose farms are situate in the county of Donegal outside the territory of Northern Ireland but within a few miles of the boundary. For a considerable time before 1934 they had been in the habit of selling their milk in the city of Londonderry, which appears to have been their natural market. In 1935 Mr. Alexander, a solicitor practising in Londonderry, having also a dairy farm in county Donegal, having asked for a producer's licence and being refused, applied for a mandamus to the Minister to grant him a licence. The rule was discharged by the King's Bench Division and this decision was affirmed by the Court of Appeal. The ground taken by the Minister and upheld by the Courts was that it was impossible to apply the Act to producers whose premises were outside Northern Ireland territory; and that such persons were not entitled to a licence under the Act. It was open to the appellants to dispute this decision before this House; it was but faintly argued; and seeing that the appellant was represented by Mr. Whitaker it is fairly obvious that the point did not arouse much enthusiasm. Your Lordships were all agreed that the decision of the Courts of Northern Ireland was right for the reason given; and I need say no more about it. It was also suggested before your Lordships that if this Act did not permit a farmer whose farm was outside Northern Ireland to obtain a licence it did not apply to them at all and therefore he could sell without any restrictions. I think that the Act must be construed as imposing control over every person who within Northern Ireland sells or exposes for sale milk, whether the milk is produced within or without Northern Ireland territory. This point also fails.

The questions as to construction of the Act are thus disposed of, and there remains the important issue as to the constitutional validity of this Act. This is attacked by reference to the terms of s. 4 of the Government of Ireland Act, 1920, of which the provisions relating to Northern Ireland remain in force. " Subject to the provisions of this Act . . . . the Parliament of Northern Ireland shall . . . . have power to make laws for the peace, order, and good government of . . . . Northern Ireland with the following limitations, namely, that they shall not have power to make laws except in respect of matters exclusively relating to the portion of Ireland within their jurisdiction, or some part thereof, and (without prejudice to that general limitation) that they shall not have power to make laws in respect of the following matters in particular, namely . . . . (7). Trade with any place out of the part of Ireland within their jurisdiction, except so far as trade may be affected by the exercise of the powers of taxation given to the said parliaments, or by regulations made for the sole purpose of preventing contagious disease, or by steps taken by means of inquiries or agencies out of the part of Ireland within their jurisdiction for the improvement of the trade of that part or for the protection of traders of that part from fraud." It is said that the provisions of the Milk Act interfere with, indeed, put an end to, the trade in milk between the farmers of Donegal and customers in Derry; and that therefore they offend against the express limitations imposed by s. 4, sub-s. 7. My Lords, the short answer to this is that this Milk Act is not a law " in respect of " trade; but is a law for the peace, order and good government of Northern Ireland " in respect of " precautions taken to secure the health of the inhabitants of Northern Ireland by protecting them from the dangers of an

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unregulated supply of milk. These questions affecting limitation on the legislative powers of subordinate parliaments or the distribution of powers between parliaments in a federal system are now familiar, and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian Parliaments. It is well established that you are to look at the "true nature and character of the legislation": *Russell* v. *The Queen* (1) "the pith and substance of the legislation." If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object, e.g., to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, e.g., a direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed "in respect of" the forbidden subject. In the present case any suggestion of an indirect attack upon trade is disclaimed by the appellant. There could be no foundation for it. The true nature and character of the Act, its pith and substance, is that it is an Act to protect the health of the inhabitants of Northern Ireland; and in those circumstances, though it may incidentally affect trade with County Donegal, it is not passed "in respect of" trade, and is therefore not subject to attack on that ground. I am of opinion, therefore, that this appeal should be dismissed with costs.

LORD THANKERTON. My Lords, I agree with the opinion which has been expressed by my noble and learned friend Lord Atkin.

LORD MACMILLAN. My Lords, I also agree.

LORD WRIGHT: My Lords, I also concur.

(1) 7 App. Cas. 839.

LORD MAUGHAM. My Lords, I concur.

Appeal dismissed.

Solicitors for appellant: *Radford, Frankland & Mercer, for Ralph S. Neilson, Belfast,* and *Joseph Alexander, Londonderry.*

Solicitors for respondent: *Linklaters & Paines, for The Chief Crown Solicitor of Northern Ireland, Belfast.*

[PRIVY COUNCIL.]

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MANSELL . . . . APPELLANT;

AND

STAR PRINTING AND PUBLISHING COMPANY OF TORONTO, LIMITED . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario)—Copyright—Pictures—Protection of pre-existing Canadian rights by Act of 1921—*Effect of certificate of Secretary of State—No rights conferred in Canada by Imperial Copyright Act,* 1911—*Canadian Copyright Act,* 1906, *R. S. C., c.* 70, *s.* 6—*Canadian Copyright Act,* 1921 (10 & 11 *Geo.* 5, *c.* 24); *R. S. C.,* 1927, *c.* 32, *s.* 42, *sub-ss.* 1, 2, 5; *ss.* 45, 47; *and First Schedule—Imperial Copyright Act,* 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 25, *sub-ss.* 1, 2.

Sect. 42 of the Canadian Copyright Act, 1921, which came into force on January 1, 1924, is a transitional enactment designed to prevent the loss of rights existing before January 1, 1924, and it achieves this by conferring on those who enjoyed pre-existing rights the substituted rights defined by the Act of 1921. The pre-existing copyright enjoyed must, however, have been copyright in Canada. Where, therefore, it was established that the appellant, resident in England, who claimed to be entitled to the copyright in Canada in a number of pictures painted and admittedly published outside Canada before January 1, 1924, had not complied with the provisions of s. 6 of the Canadian Copyright Act, 1906, the Act in force in Canada immediately before the Act of 1921—not having produced or reproduced them in Canada, or recorded the copyright thereof—and had not therefore acquired copyright in them in Canada under the Act of 1906:—

Held, that he was not entitled to copyright in Canada in the pictures under the Act of 1921.

Held, further, that the certificate of the Secretary of State given under sub-s. 2 of s. 25 of the Imperial Copyright Act of 1911 did not and could not extend the Imperial Act to Canada. The certificate had merely the effect of bringing into operation the provision that Canada should for the purposes of the rights conferred by the Imperial Act (but for those purposes only) be treated as if it were a Dominion to which the Act extended. The Imperial Act conferred no rights in Canada, and it was only for the purposes of the rights conferred by it that Canada was to be treated as if the Act extended to it. The Imperial Copyright Act of 1911, therefore, conferred no rights in Canada on the appellant.

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* *Present:* LORD ATKIN, LORD MACMILLAN, LORD WRIGHT, LORD ALNESS, and LORD MAUGHAM.

Judgment of the Court of Appeal for Ontario affirmed.

APPEAL (No. 25 of 1937) from an order of the Court of Appeal for Ontario (January 27, 1937) affirming a judgment of Rose C.J.H.C. (July 11, 1936).

The appellant, A. Vivian Mansell, who resided in England, was a publisher of fine art colour prints, and did business throughout the world. In the action out of which this appeal arose he claimed copyright in thirty-eight pictures, prints of which were reproduced between March and July, 1932, by the respondents, the Star Printing and Publishing Company of Toronto, Ld., in the rotogravure section of their newspaper, the Toronto Star Weekly. At the opening of the trial the appellant abandoned any claim to copyright in four of the pictures. Of the remaining thirty-four, three had been painted after January 1, 1924, the date when the Canadian Copyright Act, 1921, came into force, and the remaining thirty-one had all been painted before January 1, 1924, and had never before been produced or reproduced in Canada. Rose C.J.H.C. held that the appellant was entitled to copyright in Canada in the three pictures painted after January 1, 1924, and he awarded him $600 damages for infringement; but he held that the appellant had no copyright in Canada in the thirty-one pictures painted before January 1, 1924.

On appeal, the Court of Appeal for Ontario (Latchford C.J.A., Middleton and Macdonnell JJ.A.) affirmed the decision of Rose C.J.H.C.

The only question in this appeal was whether the appellant was entitled to copyright in Canada in the thirty-one pictures.

The relevant statutory provisions appear from the judgment of the Judicial Committee.

K. E. Shelley K.C. and *R. M. Fowler* (of the Ontario Bar) for

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the appellant. This case raises a point which is of fundamental importance in the law of copyright not only in England, but in Canada and the other Dominions, because, if the respondents are right, in respect of any work brought into existence before January 1, 1924, which was not actually printed and published in Canada and registered there before that date, the owner of the copyright has lost his rights in Canada for all time. If the view of the appellant be right, then the owner of a copyright work in the United Kingdom has under the present Canadian Copyright Act copyright in Canada similar to the United Kingdom copyright. The essential point is whether the thirty-one pictures are the subject-matter of copyright or not, and the material Act in Canada now in force is the Copyright Act, 1921—republished in R. S. C., 1927, c. 32. The Act of 1921 repeals and replaces the provisions of the Copyright Act of 1906, R. S. C., c. 70. If the appellant has copyright in the pictures it must be found in the Act of 1921, which came into force on January 1, 1924, and that involves ultimately a reference back to the previous Act of 1906. [Reference was made to the Copyright Act, 1921, ss. 3, 4, 12, 17, 21, 22, 37, 42 and 45.] The material section is s. 42, and the last two lines of sub-s. 5 throw the appellant back to the whole section, and he must show that immediately before January 1, 1924, he was entitled to copyright or to an interest in copyright in these thirty-one pictures. The statute in force immediately before January 1, 1924, was the Canadian Copyright Act, 1906, and therefore it must be established that under the Act of 1906 the appellant was either entitled to copyright or an interest in it. The argument falls into two parts: (1.) What are the rights under the Act of 1906? and (2.) What is the true construction of the word "entitled"? [Reference was made to ss. 3, 4, 6, 7, 8, 11, 14, 15, 17, 18, 21 and 45 of the Act of 1906.] The words "entitled to a copyright" do not mean "in a position to enforce a copyright," but "in a position to obtain a copyright" although certain things must be done to reduce it into possession. Unless it is used in that sense the whole scheme of the Act becomes impracticable. It is submitted that the word "copyright" in the Act of 1906 is loosely used—sometimes it refers to an enforceable right, sometimes to a potential right. The words "entitled to" a copyright in s. 42 of the Act of 1921 mean, upon their true construction, in a position to obtain a copyright, and are not limited to being actually in possession of a copyright, and the right to obtain a copyright is a very definite interest in a copyright, which is recognized by the law. *E. W. Savory, Ld.* v. *The World of Golf, Ld.* (1) covers this case: that case must apply exactly to the position under the Canadian Act, and the reasoning, notwithstanding the difference in the language of the Fine Arts Copyright Act and the Canadian Act of 1906, is exactly on all fours. Under the Act of 1906 the appellant had a definite and indefeasible right to obtain a copyright—obviously a very valuable right—and if he is to fail there must be found in the 1921 Act a clear intention to revoke that right. That was not the intention of the Canadian Legislature when they passed the 1921 Act; it was not the intention of the Legislature to cut off prior rights which have not been reduced into possession.

The purpose of the Act of 1921 is to give effect to the provisions of the various conventions to which practically every civilized State has subscribed. In this case the Berne Convention is scheduled to the Act in the Second Schedule. [Reference was made to Copinger on the Law of Copyright, 7th ed., at pp. 261, 271.] There are observations in various cases which deal with a very similar position under the International Copyright Act, 1886. The argument is that regard must be had to the Berne Convention of 1908 in construing the present Canadian Copyright Act because regard was had to the Berne Convention then subsisting in construing the International Copyright Act of 1886, where the considerations were very similar. [Reference was made to *Hanfstaengl* v. *American Tobacco Co.* (2)] In *Gribble* v. *Manitoba Free Press, Ld.* (3), the view was taken that the Convention had the force of statute law in Canada.

(1) [1914] 2 Ch. 566, 571.
(2) [1895] 1 Q. B. 347.
(3) [1932] 1 D. L. R. 169.

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With regard to the words "any interest in such a right," there is a great deal of authority on the meaning of "interest"; a right to obtain a copyright is an interest in a copyright under the pre-existing legislation, and the appellant gets the same interest in the substituted right—that is, the right to obtain copyright under the new Act of 1921. The appellant comes within s. 42 of that Act. [Reference was made to *MacDonald* v. *Eyles* (1) and *Moul* v. *Groenings*. (2)] Reliance is placed on the plain words of s. 42: the words "where any person is . . . . entitled to any such right in any work as is specified . . . ." are entirely broad: there is no limitation to Canada. There is evidence that the thirty-one pictures were published somewhere in the world, but no evidence that they were published in Canada. There is no Canadian statute which has any reference to performing rights at all: the British Copyright Act, 1842 (5 & 6 Vict. c. 45), applied to the Dominions, but that Act only applied to works published in the United Kingdom: *Routledge* v. *Low*. (3) So immediately before the Act of 1921 there was performing right in Canada in works which had been published in the United Kingdom, but in no other works.

R. M. Fowler followed. By s. 25, sub-s. 2, of the Imperial Copyright Act, 1911, the Secretary of State may certify that legislation passed in a self-governing Dominion confers rights substantially identical with those conferred by the Imperial Act of 1911, and thereupon the Dominion "shall for the purposes of the rights conferred by this Act, be treated as if it were a Dominion to which this Act extends." Such a certificate was given on December 6, 1923 (St. R. & O., 1923, p. 168) and Canada was thereafter to be treated for the purposes of the rights conferred by the Imperial Act of 1911 as if it were a Dominion to which that Act extended. From the date of publication of the certificate, therefore, the appellant became entitled to copyright in Canada by virtue of the Imperial Act of 1911, apart altogether from Canadian statutes. This argument has the support of Copinger on the Law of Copyright,

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(1) [1921] 1 Ch. 631.
(2) [1891] 2 Q. B. 443.
(3) (1868) L. R. 3 H. L. 100.

7th ed., pp. 282-3, and of Halsbury's Laws of England, 2nd ed., vol. 7, p. 530, note "r." It would appear from Copinger that the certificate given under s. 25, sub-s. 2, of the Act of 1911 did operate to extend that Act to Canada. Copinger's view appears to be that Acts before 1911 are repealed by s. 47 of the Canadian Copyright Act of 1921, but that the Act of 1911 is not repealed. If s. 47 did not operate to repeal the Act of 1911 then it is still in force: if it did operate to repeal it then the appellant is within the proviso to s. 47.

Hon. S. O. Henn Collins K.C. and *D. L. McCarthy K.C.* (of the Ontario Bar) for the respondents. There is sufficient to account for the presence of s. 25 in the Imperial Act of 1911 in that without it the nationals of a self-governing Dominion would not be entitled to copyright under the Imperial Act. It is because the Imperial Act does not extend to a self-governing Dominion that the certificate is required under s. 25, sub-s. 2, if the work is to receive protection. The Copyright Act of 1911, which was substantially reproduced in the Canadian Act of 1921, did three things: it perpetuated existing rights, it added certain rights in respect of existing subject-matters, and it created new subject-matters. Sect. 42 of the Canadian Act is dealing simply with the perpetuation of existing rights; it does not create any new subject-matter. The question is, Had the appellant a right described as copyright before January 1, 1924, in the thirty-one pictures? It is submitted that he had not subject-matter at any time before the Act came into force; he had no copyright at all because he had not complied with the provisions of s. 6 of the Act of 1906. Subject-matter must be acquired first by reproducing the works in Canada, and then there must be registration. The appellant relies on *E. W. Savory, Ld.* v. *The World of Golf, Ld.* (1), but that case did not cite *Tuck & Sons* v. *Priester*. (2) Under the Canadian Act there was no subject-matter until publication in Canada, and that has never taken place. The appellant was never in a position even to obtain registration, and there was no existing right in him on which s. 42 of the Act of 1921 could operate.

(1) [1914] 2 Ch. 566.

(2) (1887) 19 Q. B. D. 629.

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Shelley K.C. replied. It is submitted that the construction of s. 42 of the Act of 1921 should be: Where any person is immediately before January 1, 1924, entitled *in a country to which this Act extends* to any such right in any work *to which this Act applies* as is *of the kind* specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted *kind of* right, and to no other right or interest, *in Canada*, and such substituted right shall subsist *in Canada* for the term for which it would have subsisted if this Act had been in force at the date when the work was made, and the work had been entitled to copyright thereunder.

July 28. The judgment of their Lordships was delivered by

LORD MACMILLAN. The plaintiff in these proceedings (now the appellant) is a publisher of fine art colour prints who resides in England and does business throughout the world. He complains that between the months of March and July, 1932, the respondents in infringement of his rights published in Toronto, in the illustrated section of a newspaper owned by them and known as the Star Weekly, a number of pictures of which he claims to be entitled to the copyright. The action related originally to thirty-eight pictures. In the course of the proceedings the appellant abandoned his claim to four of the pictures, and as regards three of them, which were painted after the Canadian Copyright Act, 1921, came into operation on January 1, 1924, the trial judge (Rose C.J.H.C.) held that the appellant was entitled to copyright, and awarded him $600 damages for infringement. As regards the remaining thirty-one pictures, all of which were painted before January 1, 1924, the trial judge held that the appellant had no copyright in them in Canada, and was consequently not entitled to any remedy against the respondents. This judgment was affirmed by the Court of Appeal for Ontario. The appellant says in his printed case that the appeal was dismissed "without reasons," and the respondents say that the Court of Appeal "gave no written reasons." It appears, however, from a newspaper report of the case which was supplied to their Lordships that the learned judges of the Court of Appeal in disposing of the case gave expression to their views on the questions raised, and their Lordships regret that no official record of these opinions has been made available to them, notwithstanding the requirement of r. 16 of the Judicial Committee Rules, 1925.

The only question between the parties at their Lordships' bar was whether the appellant was entitled to copyright in Canada in the thirty-one pictures painted or "made" before January 1, 1924. The appellant maintained that he was so entitled in virtue either of (1.) the Canadian Copyright Act, or (2.) the Imperial Copyright Act of 1911.

1. The Canadian Copyright Act, 1921, was substantially reproduced in chapter 32 of the Revised Statutes of Canada, 1927, and it is to the latter statute that their Lordships will refer. It being admitted that the pictures in question were "made" before January 1, 1924, the logical starting-point from which to approach the appellant's claim is to be found in sub-s. 5 of s. 42 of the Canadian Copyright Act, which enacts as follows:—

"Subject to the provisions of this Act, copyright shall not subsist in any work made before the first day of January, one thousand nine hundred and twenty-four, otherwise than under, and in accordance with, the provisions of this section."

The appellant must therefore establish his case under and in accordance with the preceding provisions of s. 42. The first sub-section reads as follows:—

"Where any person is immediately before the first day of January, one thousand nine hundred and twenty-four, entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that Schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made, and the work had been one entitled to copyright thereunder."

The First Schedule, so far as material, is in the following form :—

" Existing Rights

Existing Right.	Substituted Right.

" (*a*) In the case of Works other than Dramatic and Musical Works.

Copyright.	Copyright as defined by this Act.

* * * *

" For the purposes of this Schedule the following expressions, where used in the first column thereof, have the following meanings :—

" ' Copyright ' in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work ; "

* * * *

The definition does not apply to the pictures in question, for if " published " means, as their Lordships hold that it does mean, " published anywhere," and not merely " published in Canada," it was admitted that the pictures were published before January 1, 1924.

Their Lordships observe in the first place that s. 42 of the Act is obviously a transitional enactment designed to prevent the loss of rights existing before January 1, 1924. It achieves this by conferring on those who enjoyed pre-existing rights the substituted rights defined by the new Act. In the next place, it is clear that the pre-existing copyright enjoyed must have been copyright in Canada, for the statute in substituting

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" copyright as defined by this Act " for the pre-existing copyright is plainly conferring a new Canadian copyright in place of a previous Canadian copyright.

It was strenuously argued that s. 42 in dealing with the case of any person " entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right," covered the case of a person who was entitled anywhere to copyright or an interest in copyright, and in particular the case of the appellant, who asserted that he enjoyed in England before January 1, 1924, copyright or an interest in copyright in the pictures in question. Their Lordships cannot accept this reading. As they have just said, the copyright specified in the first column of the First Schedule must be existing copyright in Canada, for it is a new copyright in Canada that is to be substituted for it. Like is to be substituted for like. The matter is put beyond doubt by sub-s. 2 of s. 42, which deals with the case where the author of any work in which " any such right as is specified in the first column of the First Schedule to this Act subsists " on January 1, 1924, has before that date assigned the right or granted any interest therein for the whole term of the right ; in such a case " at the date when, but for the passing of this Act, the right would have expired," the substituted right conferred by the section is, in the absence of express agreement, to pass to the author of the work, and any interest therein created before January 1, 1924, and then subsisting is to determine, subject to certain qualifying provisions. The " right specified in the first column of the First Schedule " is thus a right having a term which, but for the passing of the Act, would have expired at a certain date and this term, which the Act prolongs, must plainly be a term prescribed by law in Canada. The date at which, but for the passing of the Act of 1921, the right would have expired, can be ascertained only from the previous Canadian Act of 1906, R. S. C. c. 70, under which copyright is conferred from the time of recording the copyright.

The result of the foregoing analysis of the relevant provisions of the Canadian Copyright Act is to narrow the critical issue in the present case to the simple question—Was the appellant immediately before January 1, 1924, entitled to copyright in Canada in the thirty-one pictures? If so, he must have acquired it under the previous Canadian Copyright Act of 1906. But the appellant never acquired copyright in Canada in the thirty-one pictures under the Act of 1906, for he never complied with the requirements of that Act. The condition for obtaining copyright in Canada under that Act in the case of works of art was prescribed by s. 6—namely, "that they shall be produced or reproduced in Canada," and the thirty-one pictures were never produced or reproduced there before January 1, 1924; nor did the appellant ever record the copyright thereof as required by the Act. As Lord Lindley said in giving the judgment of the Board in *Graves & Co., Ld.* v. *Gorrie* (1): "Those who want copyright in Canada for paintings, drawings, and photographs must obtain such copyright by complying with the laws of that country." There was a substantial interval of time between the passing of the Canadian Copyright Act of 1921 and its coming into operation on January 1, 1924, during which the appellant, by compliance with Canadian law, could have protected himself, but he did not do so. The result is that the appellant's case so far as founded on the present Canadian Copyright Act therefore fails.

2. Turning to the appellant's alternative submission under the Imperial Copyright Act of 1911, their Lordships are of opinion that the appellant can derive no aid from this quarter. The argument assumes that there can be simultaneously subsisting in Canada two independent copyrights—namely, copyright under the Canadian Act and copyright under the Imperial Act. Their Lordships would not readily reach so unlikely and so embarrassing a conclusion. Fortunately it is not necessary to do so. The Imperial Act, by s. 25, sub-s. 1, provides that it shall not extend to a self-governing Dominion unless declared by the Legislature of that Dominion to be in force therein. The Legislature of Canada has never declared that the Imperial Act of 1911 shall be in force therein. On the contrary, the Canadian Act of 1921 by s. 45 declared that no

(1) [1903] A. C. 496, 500.

person should be entitled to copyright otherwise than under and in accordance with the provisions of that Act or of any other statutory enactment for the time being in force; and s. 47 enacted that "all the enactments relating to copyright passed by the Parliament of the United Kingdom are, so far as they are operative in Canada, hereby repealed."

The appellant, however, sought to rely on the second sub-section of s. 25 of the Imperial Act. Under that sub-section the Secretary of State may certify that "any self-governing Dominion has passed legislation under which works, the authors whereof were at the date of the making of the works British subjects resident elsewhere than in the Dominion or (not being British subjects) were resident in the parts of His Majesty's Dominions to which" the Imperial Act extended, "enjoy within the Dominion rights substantially identical with those conferred by" the Imperial Act. On the Secretary of State so certifying, as he did in the case of Canada on December 6, 1923, "then whilst such legislation continues in force the Dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a Dominion to which this Act extends." The certificate of the Secretary of State did not and could not extend the Imperial Act to Canada. His certificate had merely the effect of bringing into operation the provision that Canada should for the purposes of the rights conferred by the Imperial Act (but for those purposes only) be treated as if it were a Dominion to which the Act extended. The Imperial Act conferred no rights in Canada, and it was only for the purposes of the rights conferred by it that Canada was to be treated as if the Act extended to it. This can only mean that although under s. 1 a Canadian author writing in Canada would not, when the Imperial Act was passed, have any copyright under the Imperial Act, the effect of the certificate would be that such an author would become a person entitled to "the rights conferred" by the Imperial Act. That is to say, Canadian authors are to have the same rights under the Imperial Act, within the area to which that Act extends, as they would have if the Act extended to Canada, but they have no rights in Canada under the Imperial Act.

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As the Imperial Act confers no rights in Canada on the appellant his second contention must share the fate of the first.

Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed, and the judgment of the Court of Appeal of Ontario of January 27, 1937, be affirmed. The appellant will pay the respondents' costs of the present appeal.

Solicitors for appellant : *Sole, Sawbridge & Co.*

Solicitors for respondents : *Charles Russell & Co.*

[PRIVY COUNCIL.]

ARMSTRONG AND ANOTHER . . . . . APPELLANTS ;

AND

ESTATE DUTY COMMISSIONER . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF HONG KONG (APPELLATE JURISDICTION).

Hong Kong—Revenue—Estate Duty—Bequest of annuity—Payable out of general income of Testator's estate—No specific fund allocated—No "settlement" of any property in trust for any person by way of succession—"Property passing on the death" of the annuitant—Estate duty payable—Estate Duty Ordinance, Hong Kong, No. 3 *of* 1932, *ss.* 4, 5, *sub-s.* 1 (*a*), (*b*); *s.* 9, *sub-s.* 6 (*a*), (*b*); *s.* 25, *sub-ss.* 1, 2.

Sect. 4 of the Estate Duty Ordinance, 1932, of Hong Kong, provides that estate duty shall be paid on the principal value of "all property passing on the death" of a deceased person, which, by s. 5, sub-s. 1, "shall be deemed to include . . . . (*b*) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest, ..."

By s. 25, sub-s. 1, of the Ordinance: "If estate duty has already been paid in respect of any settled property since the date of the settlement, upon the death of one of the parties to a marriage, no estate duty shall be payable on the death of the other party to the marriage unless such person was at the time of his or her death or had been at any time during the continuance of the settlement competent to dispose of such property.

"(2.) For the purposes of this section, the term settlement means any . . . . will, ... under or by virtue of which instrument . . . . any property, or any estate or interest in any property, stands for the time being limited to or in trust for any persons by way of succession, and the term settled property means the property comprised in a settlement."

A testator by his will bequeathed to his wife an annuity of 10,000*l*. during her life. No specific fund was set aside by the trustees of the will to meet the annuity, which was in fact paid out of the general income of the estate. The whole of that income was not applied in meeting the annual payments. The annuitant was not at any time competent to dispose of the property out of the income of which her annuity was payable. Estate duty had been paid in Hong Kong on the whole of the testator's estate when probate was granted. On a claim by the

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* *Present:* LORD MAUGHAM, SIR LANCELOT SANDERSON, and SIR SIDNEY ROWLATT.

Estate Duty Commissioner that upon the death of the annuitant estate duty became payable under s. 5, sub-s. 1, of the Estate Duty Ordinance, 1932, to the extent to which a benefit accrued by the cesser of the annuity :—

Held, that there was property of the testator in which the annuitant had an interest ceasing at her death within the meaning of s. 5, sub-s. 1 (*b*), of the Ordinance, and that therefore to the extent to which a benefit accrued by the cesser of the annuity that property was deemed to be included in property passing on the death of the annuitant.

Held, further, that there was not a " settlement " within the meaning of s. 25, sub-s. 2, of the Ordinance, under or by virtue of which any property, or any estate or interest in property, stood during the lifetime of the annuitant limited to or in trust for any person by way of succession, and that therefore the exemption conferred by s. 25, sub-s. 1, did not operate, and estate duty was accordingly payable. The phrase " any property, or any estate or interest in any property " in s. 25, sub-s. 2, of the Ordinance, coupled with the words " stands limited," referred to definite property or an estate or interest in it which actually existed and could be precisely defined. There was no such definite property allocated in the present case, and a hypothetical slice of the property passing by the will could not properly be treated as an interest in that property within the meaning of s. 25, sub-s. 2.

Judgment of the Full Court of the Supreme Court of Hong Kong (1936) 28 H. K. L. R. 1, affirmed.

APPEAL (No. 64 of 1936) from a judgment of the Full Court of the Supreme Court of Hong Kong (February 17, 1936), affirming a judgment of the Supreme Court of Hong Kong (June 27, 1935).

This appeal raised the question whether under s. 5, sub-s. 1, of the Estate Duty Ordinance, 1932, of Hong Kong, estate duty was payable upon the death of Lady Maria Christine Chater in respect of an annuity bequeathed to her by her husband, Sir Catchick Paul Chater, who died on May 27, 1926, or whether s. 25 of the Ordinance of 1932 operated to relieve the estate of the payment of the duty.

The facts, which are shortly stated in the head-note, the material clauses of the will of the testator, and the relevant provisions of the Estate Duty Ordinance are fully stated in the judgment of the Judicial Committee.

The Supreme Court of Hong Kong (MacGregor C.J.) affirmed the decision of the Estate Duty Commissioner, the present respondent, and held that estate duty was payable.

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An appeal by the trustees of the will to the Full Court of the Supreme Court of Hong Kong (Lindsell A.C.J. and Hayden J.) was dismissed. The appeal is reported at (1936) 28 H. K. L. R. 1.

1937. April 29, 30. *Fergus Morton K.C.* and *Wilfrid Hunt* for the appellants. The testator's will constituted a settlement under or by virtue of which the portion of his estate required for payment of the annuity stood for the time being limited in trust for the widow and the residuary legatees by way of succession, and was settled property within the meaning of s. 25 of the Ordinance. Therefore, as, first, the testator and the annuitant were parties to a marriage, being husband and wife, and secondly, the annuitant was not at any time competent to dispose of any of such residuary estate, and thirdly, estate duty on the whole of the testator's estate had been paid on his death, the effect of s. 25 of the Ordinance was that no estate duty became payable on the cesser of the annuity on the widow's death. The respondent bases and can only base his claim to estate duty on the cesser of the annuity upon the contention that by reason of her annuity the widow had, under the testator's will, an interest in his residuary estate or a sufficient portion thereof which ceased on her death, and if she had an interest therein which ceased on her death it follows, it is submitted, that such property or the portion thereof, stood for the time being limited in trust for persons by way of succession. The authorities establish that in any case if a fund is set aside to answer an annuity, then such fund constitutes settled property, and it is submitted that the position is the same on principle where, as in the present case, the trustees had power to set aside such a fund and the residuary legatees were entitled, if they had so thought fit, to obtain at any time an order to set aside such a fund and for immediate distribution of the rest of the residuary estate, and the mere fact that no such fund was actually set aside ought not to affect the position in respect of estate duty, especially as the will only gives the residuary estate subject to making provision for payment of the annuities. It is not

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contended on the construction of the will that the trustees were bound to appropriate a specific sum. The exemption conferred by s. 25 ought to be construed liberally, and the practice of the Estate Duty Office in England is to treat cases where a surviving spouse is given an annuity simpliciter under the will of the other spouse as causing the property subject to such annuity to be " settled property " and therefore within the corresponding exemption in the Finance Acts: Dymond on The Death Duties, 7th ed., p. 262. The position under the Ordinance ought to be the same, as its language is based on and similar to that of the English Finance Acts. [Reference was made to *Attorney-General* v. *Watson* (1); *Attorney-General* v. *Coole* (2); *Attorney-General* v. *Owen* (3); *In re Campbell* (4); *In re Waller* (5); *In re Booth* (6); *In re Williams* (7); *Berry* v. *Gaukroger* (8); *In re Earl of Carnarvon's Chesterfield Settled Estates* (9); and *In re Lord Alington and the London County Council's Contract* (10); and to Green on Death Duties, p. 55; and Halsbury's Laws of England, vol. xiii., p. 252.]

Wilfrid Hunt followed, and referred to *In re Evans and Bettell's Contract.* (11)

Latter K.C. and *Reginald Hills* for the respondent. Estate duty has been rightly charged under s. 5, sub-s. 1 (*b*), of the Ordinance in respect of the value of the benefit arising from the cesser of the annuity payable under the will of the testator to his widow. There was property of the testator in which the annuitant had an interest ceasing at her death. No relief in respect of such duty is provided by s. 25 of the Ordinance, because the gift of the annuity under cl. 5 of the will did not constitute a settlement within the meaning of s. 25. A bequest of an annuity in a will does not of itself, and in the absence of any appropriation by the trustees of property to meet it as it falls due, constitute a settlement within the meaning of s. 25 of the Ordinance " by virtue of which any

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(1) [1917] 2 K. B. 427.
(2) [1921] 3 K. B. 607.
(3) [1899] 2 Q. B. 253.
(4) [1902] 1 K. B. 113, 118, 120.
(5) [1916] 1 Ch. 153.
(6) [1916] 1 Ch. 349.
(7) [1933] Ch. 244.
(8) [1903] 2 Ch. 116.
(9) [1927] 1 Ch. 138, 146.
(10) [1927] 2 Ch. 253.
(11) [1910] 2 Ch. 438, 442.

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property or any estate or interest in any property stands for the time being limited to or in trust for any person by way of succession." The trustees of the will were under no duty to appropriate any property to meet the widow's annuity, and the rule of equity that that which ought to have been done shall be treated as having been done does not apply. It is not possible to say on the facts of this case that any particular property was during the widow's life held in trust for her and other persons by way of succession. Her right or interest in the property, i.e., the residuary estate, was a right to be paid 10,000*l.* a year during her life. That was not an interest which stood limited to any other persons by way of succession; it came to an end altogether. [Reference was made to *Gleaner Co.* v. *Assessment Committee* (1); *In re Mundy and Roper's Contract* (2); *Attorney-General for Ontario* v. *Perry* (3); *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan* (4); *De Trafford* v. *Attorney-General* (5); *Attorney-General* v. *C. E. de Trafford* (6); *Attorney-General* v. *Owen* (7); *In re Campbell* (8); *In re Waller* (9); *In re Earl of Carnarvon's Chesterfield Settled Estates* (10); *In re Lord Alington and the London County Council's Contract* (11); *Attorney-General* v. *Watson* (12); *Attorney-General* v. *Coole* (13); *In re Booth* (14); and to Soward on Estate Duty, 5th ed., p. 63.]

Reginald Hills followed.

Fergus Morton K.C. replied.

1937. May 27. The judgment of their Lordships was delivered by LORD MAUGHAM. This is an appeal from a judgment of the Full Court of the Supreme Court of Hong Kong (Lindsell A.C.J. and Hayden J.), delivered on February 17, 1936, affirming a judgment delivered on June 27, 1935, by MacGregor C.J. The last mentioned judgment dismissed a petition of the trustees of the will and codicils of Sir Catchick Paul Chater (called below " the testator ") appealing against a certificate of the respondent deciding that estate duty was payable upon the death of Lady Maria Christine Chater in respect of an annuity bequeathed to her by the testator. Lady Maria Christine Chater was the widow of the testator, and will be called " Lady Chater."

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(1) [1922] 2 A. C. 169, 175.
(2) [1899] 1 Ch. 275, 288.
(3) [1934] A. C. 477.
(4) [1933] A. C. 378.
(5) [1935] A. C. 280, 290.
(6) (1933) 150 L. T. Rep. 24, 34.
(7) [1899] 2 Q. B. 253, 262–3, 265.
(8) [1902] 1 K. B. 113, 120, 121–2.
(9) [1916] 1 Ch. 153.
(10) [1927] 1 Ch. 138, 146–7.
(11) [1927] 2 Ch. 253, 261.
(12) [1917] 2 K. B. 427.
(13) [1921] 3 K. B. 607.
(14) [1916] 1 Ch. 349.

The testator died on May 27, 1926, and his will, dated April 17, 1925, with two codicils thereto, was proved in Hong Kong on September 9, 1926, by Sir William Edward Leonard Shenton Reginald Frederick Mattingly and Lady Chater, who were the executors and trustees under the said will and codicils. The appellants are now the present trustees of the will and the codicils.

The will of the testator provided, so far as is material, as follows: " (5.) I bequeath the following annuities all clear of death duties and income tax payable to the respective parties hereinafter enumerated commencing from my death by equal quarterly payments the first payment in each case to be made at the expiration of three months from my death :—(*a*) to my wife during her life the annual sum of ten thousand pounds sterling, [and other annuities as therein mentioned].

(8.) Subject to the payment of my funeral and testamentary expenses and debts and any legacies bequeathed by this my will or by any codicil hereto and the duty (if any) upon legacies and annuities bequeathed free of duty and subject to making provision for the payment of any annuities bequeathed by this my will or by any codicil hereto my trustees shall invest [in manner therein authorised].

(13.) I declare that my trustees shall be at liberty if they so think fit to appropriate and set apart out of my residuary estate investments representing such a capital fund as shall at the time of appropriation be sufficient to produce the annual sums directed to be paid by clause five of this my will with such a liberal margin for contingencies as in the opinion of my trustees shall be sufficient And I declare that when such appropriation has been made the said annual sums shall be wholly charged on the investments so appropriated in exoneration of the rest of my estate but that the capital of such appropriated investments may be resorted to in case at any time the income thereof is insufficient to pay any such annual sum or sums. . . . ."

Estate duty was paid on the whole of the estate of the testator when probate was granted in 1926. No fund was set aside by the trustees to meet the annuity to Lady Chater, the widow of the deceased, and the annuity was in fact paid out of general income of the estate as and when the annuity became due. Lady Chater died on March 11, 1935, and thereupon her annuity ceased.

Estate duty is charged in the Colony of Hong Kong according to the Estate Duty Ordinance, 1932. The Ordinance provides, so far as is material, as follows :—

Sect. 4. : "In the case of every deceased person there shall, save as hereinafter expressly provided, be levied and paid upon the principal value, ascertained as hereinafter provided, of all property passing on the death of such person, a stamp duty called estate duty at the graduated rates mentioned in the applicable schedule."

Sect. 5, sub-s. 1 : "Property passing on the death of the deceased shall be deemed to include the property following :—

> "(*a*) property of which the deceased was at the time of his death competent to dispose ;
>
> "(*b*) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest, ..."

Sect. 9, sub-s. 6 : "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall,

> "(*a*) if the interest extended to the whole income of the property, be the principal value of that property ; and
>
> "(*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

Sect. 25, sub-s. 1 : "If estate duty has already been paid in respect of any settled property since the date of the settlement, upon the death of one of the parties to a marriage, no estate duty shall be payable on the death of the other party to the marriage unless such person was at the time of his or her death or had been at any time during the continuance of the settlement competent to dispose of such property.

" (2.) For the purposes of this section, the term settlement means any deed, will, agreement for a settlement, or other instrument, or any number of instruments, whether made before or after or partly before and partly after the commencement of this Ordinance, under or by virtue of which instrument or instruments any property, or any estate or interest in any property, stands for the time being limited to or in trust for any persons by way of succession, and the term settled property means the property comprised in a settlement."

The respondent claimed that upon the death of Lady Chater estate duty became payable under s. 5, sub-s. 1, of the Ordinance to the extent to which a benefit accrued by the cesser of the annuity, and he made an assessment for estate duty and interest on May 20, 1935, at $153,511. This assessment was disputed by the appellant trustees. They presented a petition to the Supreme Court of Hong Kong appealing from the adverse decision and assessment of the respondent. The petition of appeal was dismissed by the then Chief Justice (MacGregor C.J.) on June 27, 1935, and an appeal from his decision was dismissed on February 17, 1936, by Lindsell A.C.J. and Hayden J.

The short and apparently simple point which falls for decision is whether, on the facts of the case, there is or is not " a settlement " to use the language of s. 25, sub-s. 2, under or by virtue of which instrument any property or any estate or interest in any property stood, during the lifetime of Lady Chater, limited to or in trust for any persons by way of succession. Lady Chater was not at any time competent to dispose of the property out of the income of which her annuity was payable, and since estate duty was paid in respect of the property passing under the will upon the death of the testator the exemption given by s. 25, sub-s. 1, would apply on the death of Lady Chater provided there could be shown to be "settled" property within the meaning of s. 25. The appellants contended that the testator's will constituted such a settlement, inasmuch as a "slice," as it is called, of the testator's estate must be treated as within the words "any property, or estate or interest in any property," and that such slice or portion of the estate stood, for the time being, limited to or in trust for the residuary legatees by way of succession.

Several English cases dealing with succession duty payable under the Finance Act, 1894, and the Amending Acts were relied on. The first of these cases was *Attorney-General* v. *Owen.* (1) In that case a testatrix had bequeathed an annuity to a certain person, and directed that a portion of her estate should be set aside to provide for the payment of the annuity, and it was held that the property so set apart was property standing limited to or in trust for persons by way of succession within the meaning of s. 2, sub-s. 1, of the Settled Land Act, 1882. Settlement estate duty was accordingly payable in respect of it. It will be remembered that by s. 22 of the Finance Act, 1894, the expression "settlement" was defined by reference to s. 2 of the Settled Land Act, 1882. The learned judges placed much reliance on the then recent decision of the Court of Appeal in *In re Mundy and Roper's Contract* (2) as to the meaning of the word "settlement" in the Settled Land Act, and they accordingly held that the phrase "by way of succession" was one which might be treated as equivalent to successively upon death, and that there was a succession in a popular sense in the enjoyment of the portion of the estate of the testatrix which had been set aside to provide the annuity.

In *In re Campbell* (3) an almost identical question came before the Court of Appeal. In that case also the trustees in pursuance of directions given by a testator had set aside out of the residuary estate a sum which was invested so as to produce an income sufficient to pay a number of annuities. Collins M.R., following the decision in *Attorney-General* v.

(1) [1899] 2 Q. B. 253.
(2) [1899] 1 Ch. 275.
(3) [1902] 1 K. B. 113.

Owen (1) and relying on the decision in *In re Mundy and Roper's Contract* (2) as to the true construction of the Settled Land Act, 1882, came to the conclusion that the specific fund upon which was imposed a direct trust in favour of the annuitants, being a fund which after their death passed to the residuary legatees, was property which stood limited in trust for persons by way of succession. Stirling L.J. came to the same conclusion, but he added this (3): "I only wish to add that it was admitted in argument that this decision does not conclude the case of the simple gift of an annuity in general terms, where there is no such trust for payment of the annuity out of a particular fund as in the present case. I desire in giving judgment in this case to leave that case entirely untouched."

In *In re Waller* (4) Sargant J. had incidentally to deal with a similar matter; and again the trustees had appropriated an annuity fund. Sargant J., in the course of his judgment, observes as follows (5): "The gift of the annuity simpliciter would not, in my opinion,—at any rate I am not aware of any decision to that effect—have rendered any part of the testator's estate a settled fund or have subjected the annuity to the payment of settlement estate duty—that is to say, the principal gift of the annuity would not have rendered it liable to settlement estate duty at all. The liability to settlement estate duty according to the cases to which I have been referred—*Attorney-General* v. *Owen* (1) and *In re Campbell* (6)—would seem to arise from the direction to set aside a portion of the testator's estate for the purpose of paying the annuity; . . . ."

It is said that this statement was of the nature of a dictum, and it may be that it was not strictly necessary for the decision of the case, but in the opinion of their Lordships the observation of so learned a judge calls for great respect.

The case of *Attorney-General* v. *Watson* (7) was also relied on, but it merely decided that an annuitant whose annuity

(1) [1899] 2 Q. B. 253.
(2) [1899] 1 Ch. 275.
(3) [1902] 1 K. B. 123.
(4) [1916] 1 Ch. 153.
(5) [1916] 1 Ch. 158.
(6) [1902] 1 K. B. 113.
(7) [1917] 2 K. B. 427.

was to be paid out of a residuary estate, as in the present case, without any provision for setting aside a fund to meet the payments, had an interest in the residuary estate within the meaning of the relevant sections of the Finance Act. In other words, applying the case to the present circumstances, it decided that duty was prima facie payable to the extent of the interest ceasing on the death of the annuitant within the meaning or within the provisions of s. 5, sub-s. 1.

In *In re Lord Alington and the London County Council's Contract* (1) Lord Russell of Killowen, then Russell J., observed as regards *In re Campbell* (2) that (3): "when that case is looked at all that it decided was that where a fund was set aside out of a mixed residue to provide by the income thereof certain annuities, upon the cesser of which the persons entitled to residue would be entitled to the fund, settlement estate duty was payable on so much of the residue as had been set aside. It was held that the fund was limited in trust for persons by way of succession. That decision does not justify the proposition that the existence of a jointure charged on an estate vested in an owner in fee made, under the old law, the estate a settled estate."

Two observations fall to be made in regard to these decisions. In the first place, they deal with cases in which a fund had been appropriated exclusively for the services of the annuity or annuities, and so far from there being any expression of opinion in favour of the view that a mere gift in a will of an annuity has the result of effecting a settlement within the meaning of the Finance Act, the general opinion seems rather to tend the other way. In the second place, it is plain that the learned judges placed great reliance on the circumstance that the Finance Act, 1894, defines a settlement by reference to the Settled Land Act, a statute which, as held by the House of Lords, required a generous interpretation: see *Lord Henry Bruce* v. *Marquess of Ailesbury*. (4) Their Lordships desire to express no opinion on the question whether, according to English law, there is a settlement within the meaning of the

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(1) [1927] 2 Ch. 253.
(2) [1902] 1 K. B. 113.
(3) [1927] 2 Ch. 261.
(4) [1892] A. C. 356.

Finance Act in a case where there has been a gift of an annuity by will and no appropriation has been made out of which it is to be paid. The case which they have to decide depends upon the true construction of the Ordinance, No. 3 of 1932, of Hong Kong.

It is well settled that in interpreting a taxing statute of a Dominion or a Colony which contains, on its face, no reference to its origin or to previous legislative history, it is not permissible to consider the evolution of any British statute or provision from which the terms or whole sections of the enactment under consideration may have been taken, or to rely on decisions as to the true interpretation in the Courts of Great Britain of those terms or sections. (See *Attorney-General for Ontario* v. *Perry.* (1)) Their Lordships are, therefore, bound to determine the present appeal simply on the true construction of the Ordinance. The cases above referred to have been mentioned partly because they may be of use by way of illustration, and partly because they were greatly relied on by the appellants. As regards s. 5, sub-s. 1, there can be no doubt as to its applicability in the present case. There was property of the testator in which Lady Chater had an interest ceasing at her death, and to the extent to which a benefit accrued by the cesser of the annuity that property was deemed to be included in property passing upon the death of the deceased. The difficulty arises when we come to consider the true effect of s. 25, sub-s. 2, untrammelled by any authority. Was there under the will of the testator any property or any estate or interest in any property which before the death of Lady Chater stood limited to or in trust for the residuary legatees by way of succession? It is clearly not enough to show that there was a species of charge upon the property of the testator for the benefit of Lady Chater. It must be shown that substantially the whole of certain property, or of the estate or interest in it, was held upon trust, in effect, for Lady Chater during her life and, so far as benefit was concerned, passed to the residuary legatees upon her death. This it may be noted—again by way of illustration—was

(1) [1934] A. C. 477, 487.

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the test adopted by Kennedy J. in *Attorney-General* v. *Owen* (1) and followed by Stirling L.J. in *In re Campbell* (2), and that, as already pointed out, in cases where there were strong reasons for giving a wide interpretation to the word "settlement." The whole of the income of the estate was not applied in making the annual payments to Lady Chater. Nor can their Lordships hold that a hypothetical slice of the property passing by the will can properly be treated as an interest in that property within the meaning of s. 25, sub-s. 2. The "slice," indeed, is an expression employed in this connection only for the purpose of valuation. Construing the Ordinance as it stands, and without reference to the Settled Land Act, their Lordships must come to the conclusion that the phrase "any property, or any estate or interest in any property," coupled with the words "stands limited" (which are by no means equivalent to "passes or is deemed to pass"), refers to definite property, or an estate or interest in it, which actually exists, and can be precisely defined. It should, perhaps, be added that for the purpose of an exemption such as that given by s. 25, sub-s. 1, the actual facts must be looked at, and that it is impossible to hold that exemption should be granted merely because events which have not taken place might well have taken place since they were clearly within the powers of the trustees. Their Lordships must, therefore, agree with the judgment of the learned Chief Justice on the petition, and of the learned judges on the appeal to the Full Court.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for appellants: *Gibson & Weldon.*
Solicitors for respondent: *Burchells.*

(1) [1899] 2 Q. B. 253.
(2) [1902] 1 K. B. 113.

[PRIVY COUNCIL.]

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ESTATE AND TRUST AGENCIES (1927), LIMITED . . . . APPELLANTS;

AND

SINGAPORE IMPROVEMENT TRUST . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF THE STRAITS SETTLEMENTS (SETTLEMENT OF SINGAPORE).

Straits Settlements (Singapore)—Prohibition—Housing—Dwelling-house declared insanitary—Proposed demolition—Declaration submitted to Governor in Council—Application for writ of prohibition to prohibit proceedings under declaration—Declaration not justified on grounds submitted—Quasi-judicial functions—Housing authority not functus officio after submission of declaration—Duties remaining to be discharged—Singapore Improvement Ordinance, No. 10 *of* 1927, *ss.* 4, 57, 58, 59, 60, 61.

The respondents, a corporate body constituted by the Singapore Improvement Ordinance, 1927, and entrusted with the duty of carrying out the provisions of the Ordinance, made a declaration that a dwelling-house belonging to the appellants was insanitary within the meaning of s. 57 of the Ordinance. Having heard objections by the appellants to the declaration, the respondents in due course submitted it for consideration by the Governor in Council in accordance with the provisions of s. 59 of the Ordinance. The appellants thereupon applied for a writ of prohibition to prohibit the respondents from proceeding further in respect of the declaration, on the ground (inter alia) that they had acted ultra vires in making it:—

Held, first, that the grounds on which the respondents made the declaration did not justify it, and that they were therefore acting beyond their powers and the declaration was not enforceable.

Held, secondly, that in deciding whether, after considering the objections raised by the appellants against the declaration, it should be revoked or submitted to the Governor in Council under s. 59, sub-s. 1, of the Ordinance, the respondents were exercising quasi-judicial functions.

Observations of Greer L.J. in *Errington* v. *Minister of Health* [1935] 1 K. B. 249, 259, approved and applied.

Held, thirdly, that a writ of prohibition should issue. Although the declaration had been submitted to the Governor in Council by the respondents they were not functus officio because in the exercise of their quasi-judicial functions they had still (inter alia) the discretionary power under s. 61, sub-s. 1, of the Ordinance, if the Governor in Council approved the declaration, of requiring the appellants to demolish the building. There was, therefore, something upon which prohibition could still operate, and the application for the writ was not made too late.

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* *Present:* LORD MAUGHAM, SIR LANCELOT SANDERSON, and SIR SIDNEY ROWLATT.

Dictum of R. S. Wright J. in *In re The London Scottish Permanent Building Society* (1893) 63 L. J. Q. B. 112, 113, approved and applied.

When a house is stated to be unfit for human habitation, it is the whole house that is being so described.

Dicta of Lord Dunedin and of Lord Parker in *Hall* v. *Manchester Corporation* (1915) 113 L. T. Rep. 465, referred to.

Judgment of the Court of Appeal of the Straits Settlements (Settlement of Singapore) [1935] S. S. L. R. 255 reversed.

APPEAL (No. 36 of 1936) from an order of the Court of Appeal of the Straits Settlements (Settlement of Singapore) (August 1, 1935), allowing an appeal by the present respondents, Singapore Improvement Trust, from an order of the Supreme Court of the Straits Settlements (Settlement of Singapore) (April 2, 1935), which directed a writ of prohibition to issue to the respondents. The Court of Appeal in allowing the respondents' appeal ordered the writ of prohibition to be set aside.

The appellants, Estate and Trust Agencies (1927), Ld., were the owners of a house known as Municipal No. 543, North Bridge Road, Singapore. The respondents, Singapore Improvement Trust, were a corporate body constituted by the Singapore Improvement Ordinance, 1927, and entrusted (by s. 4) with the duty of carrying out the provisions of that Ordinance. On December 11, 1933, the respondents caused to be served upon the appellants notice of a resolution passed by the respondents on November 22, 1933, under s. 57 of the Ordinance of 1927, whereby the respondents had declared the appellants' house (among other houses) to be insanitary. On December 27, 1933, the appellants objected in writing to the declaration, and requested to be supplied with a statement in writing of the grounds upon which the respondents had made the declaration. On January 3, 1934, the respondents furnished the appellants with a copy of the report of Dr. Dawson, the Acting Municipal Health Officer, on the house, stating the grounds upon which the house was declared to be insanitary. The respondents heard objections to the declaration on February 21 and 22, 1934. The appellants called expert evidence to prove that their house was not unfit for human habitation. The respondents called no evidence.

On May 22, 1934, the declaration was submitted by the respondents to the Governor in Council for his consideration in accordance with the provisions of s. 59 of the Ordinance. On June 6, 1934, notice was given by the appellants to the respondents that application would be made for a writ of prohibition; and subsequently an originating summons was issued asking for a writ of prohibition prohibiting the respondents from proceeding further in respect of the declaration in question. It was alleged (inter alia) that the respondents had acted ultra vires in making the declaration. Affidavits were filed by the appellants and the respondents.

The Municipal Health Officer's report, the affidavit of the chairman of the respondents, and the relevant provisions of the Singapore Improvement Ordinance, 1927, appear from the judgment of the Judicial Committee.

The application for the writ of prohibition was heard by the Supreme Court (Huggard C.J.), who held that the respondents, having a duty to exercise functions of a judicial or quasi-judicial character, were amenable to a writ of prohibition, and that as there was still something left to be done by them they were not functus officio; that the respondents had taken into account matters other than the condition and construction of the appellants' individual house, and that the action of the respondents was therefore ultra vires; that the respondents had taken into consideration matters outside s. 57 and outside the Municipal Health Officer's report, and that s. 57 applied only to a building unfit in itself by reason of its construction or condition; and he ordered a writ of prohibition to issue.

On appeal by the respondents the Court of Appeal (Thomas C.J., Federated Malay States, and Terrell J.; Burton A.C.J. dissenting) allowed the appeal. Thomas C.J.

and Terrell J. concurred in holding that after the declaration was submitted to the Governor in Council the respondents had no more to do as regards their judicial functions and were a body functus officio, with the result that the application for prohibition was made too late, and they also concurred in thinking that the respondents did not take into consideration any extraneous matter or depart from the powers conferred on them by s. 57.

Burton A.C.J. held that, since the respondents would have the duty of carrying out the declaration if it were approved by the Governor in Council, it was not too late to issue a writ of prohibition. The appeal is reported at [1935] S. S. L. R. 255.

1937. April 22, 23, 26, 27. *Montgomery K.C.*, *R. Storry Deans* and *H. D. Mundell* (Singapore) for the appellants. "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs": *Rex* v. *Electricity Commissioners.* (1) Failure to comply with statutory requirements is a ground for prohibition from all further proceedings. In other words, compliance with the statutory requirement of providing owners with a statement of all the grounds on which the Improvement Board made the declaration is a condition precedent to the validity of every subsequent proceeding under the Ordinance. The statement of the grounds upon which the declaration was made by the respondents that the appellants' house was unfit for human habitation was not a sufficient or proper statement of grounds within the meaning of s. 58, sub-s. 5, of the Ordinance, and until such sufficient and proper statement of grounds had been furnished to the appellants in writing the respondents had no jurisdiction to consider objections or to submit the declaration to the Governor in Council. [On the meaning placed by the House of Lords on "unfit for human habitation"

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(1) [1924] 1 K. B. 171, 205.

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and "structural condition" reference was made to *Hall* v. *Manchester Corporation.* (1)] The Improvement Board, in considering whether a declaration should be made, was exercising quasi-judicial functions, and having taken extraneous matters into consideration there was excess of jurisdiction and accordingly no legal declaration in existence. If want of jurisdiction is apparent on the face of the proceedings the Court must grant prohibition, if there is anything left to prohibit. If want of jurisdiction is only shown aliunde, and depends on a fact known to the applicant, the Court has a discretion: *Rex* v. *Electricity Commissioners* (2); *Rex* v. *Minister of Health. Ex parte Davis.* (3) Prohibition is never too late so long as there is, as there was in this case, something for it to act upon, i.e., so long as it will have any effect: it is immaterial that what remains to be done—that on which prohibition can have effect—is merely administrative and not part of judicial functions: *Darby* v. *Cosens* (4); Shortt on Mandamus and Prohibition (1887), at p. 454.

Prohibition will lie against a litigant party just as well as against a Court, and the respondents are made a party before the Governor in Council. They may be prohibited from acting as parties and carrying the matter any further—from taking any further proceedings in respect of their declaration. This Board would not refuse a prohibition just because it might not prove effective, and will restrain the respondent Improvement Board when there is something resulting from its own action without jurisdiction which it may do in the future: *Mayor, etc., of London* v. *Cox* (5); Shortt on Mandamus and Prohibition (1887), at p. 486; Halsbury's Laws of England, 2nd ed., vol. 9, p. 836, para. 1413. The right of appeal does not take away the right to prohibition. Lastly, the grounds for the declaration must, by the statute, be given in writing; if they are not, then that is a statutory step which, not being taken, makes the whole decision altogether invalid, and there is no declaration. [Reference was also made to *Chabot* v. *Lord Morpeth* (1); *White* v. *Steel* (2), and *Serjeant* v. *Dale.* (3)]

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(1) (1915) 113 L. T. Rep. 465, 468.

(2) (1924) 1 K. B. 171, 189, 192, 198, 205-7.

(3) [1929] 1 K. B. 619, 626.

(4) (1787) 1 T. R. 552.

(5) (1866) L. R. 2 H. L. 239, 279–281.

Storry Deans followed. The Court will interfere in a case where there has been a clear excess of jurisdiction, i.e., where a Court has done something which it had no manner of right to do. The Court will interfere by prohibition at any time to correct the mischief—the execution of the illegal order—and will even interfere to restore after the order has been executed. [Reference was made to *Jones* v. *Owen* (4), which is cited at p. 481 of Shortt on Mandamus and Prohibition.]

Sir Gerald Hurst K.C. and *H. A. Hill* for the respondents. If prohibition is not an appropriate remedy, and is in any event too late, the question of merits will not arise. The argument may be put in three propositions: (1.) The Improvement Board is not a Court, and never acted judicially or quasi-judicially at any stage. (2.) If the Board ever acted quasi-judicially it did so only from February 21, 1934, when it held a meeting to hear objections, to March 22, 1934, when it submitted its declaration to the Governor in Council, and thereafter it was functus officio. The only power which the Board has is a power to appear and plead its case before the Governor in Council. (3.) If the Board is functus officio, prohibition will not lie because there are no further proceedings in excess of jurisdiction on which prohibition can operate. As part of proposition (3.) it is submitted that the residuum of rights and duties under the Ordinance consist of two things: (*a*) those powers which are permitted to the Board as a quasi-litigant in a new proceeding before the Governor in Council; and (*b*) purely administrative acts required to carry out the statutory duties if an order should be made by the Governor in Council. It is incumbent on the appellants to show that the respondent Board was at some time a judicial body exceeding or usurping jurisdiction. What is the hall-mark of a quasi-judicial body? According to the authorities, to make a body like the respondents a quasi-judicial body there must be first of all a lis—an existing dispute between two or more parties; and secondly, a body to be a quasi-judicial one must be capable of making an order which determines or affects the rights of subjects. In both those respects the respondents have at all material times fallen short: *Clifford and O'Sullivan* (1); *Errington* v. *Minister of Health.* (2) Everything that is preliminary to the lis is all done by the Board in an administrative capacity: *Rex* v. *Howard.* (3) Upon the construction of the Singapore Improvement Ordinance there is no adjudication at all. There is no determination of questions affecting the rights of subjects at any stage, nor is there any decision which affects the rights of subjects in the legal sense by the respondents at any stage, because the declaration on the true construction of the Ordinance is no more than a formulation of the Boards' case that this is an insanitary house unfit for human habitation. [Reference was also made to *Rex* v. *Electricity Commissioners.* (4)]

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(1) (1850) 15 Q. B. 446.

(2) (1862) 12 C. B. N. S. 383; 31 L. J. (C. P.) 265.

(3) (1877) 2 Q. B. D. 558.

(4) (1848) 18 L. J. (Q. B.) 8.

With regard to the merits, it is submitted that the whole of the assumption that there has been an excess of jurisdiction by the respondents is quite unfounded when the grounds for declaring the house insanitary in the Acting Municipal Health Officer's report are considered, and the way in which the adjudication on those grounds was conducted is fairly reviewed. Prohibition lies in excess or usurpation of jurisdiction, not for a mere error in practice and procedure, and if in fact the notice of grounds was defective in that it did not sufficiently particularize the defects on which the Board relied, that, if an error at all, is only an error in procedure and does not amount to excess or usurpation of jurisdiction, and the appellants have a remedy by way of appeal to the Governor in Council: *Martin* v. *Mackonochie.* (5)

H. A. Hill followed. In making the declaration that the house was insanitary the respondent Board acted within their jurisdiction, and the declaration was accordingly a valid

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(1) [1921] 2 A. C. 570, 582.
(2) [1935] 1 K. B. 249.
(3) [1902] 2 K. B. 363, 380–1.
(4) [1924] 1 K. B. 171.
(5) (1879) 4 Q. B. D. 697, 786.

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one. Failure to furnish a statement of grounds would not invalidate the declaration previously made. If the respondents have acted without jurisdiction, prohibition is not the right remedy, which, in this case, is for the appellants to prohibit the Governor in Council from considering an order made without compliance with the Ordinance. [Reference was made to *Rex* v. *Minister of Health. Ex parte Davis* (1); *Minister of Health* v. *The King* (*on the Prosecution of Yaffe*). (2)]

There was no reply.

May 31. The judgment of their Lordships was delivered by Lord Maugham. This is an appeal from an order of the Court of Appeal of the Straits Settlements (Settlement of Singapore), dated August 1, 1935. By the judgments of the majority of the Court (Thomas C.J., Federated Malay States, and Terrell J., Burton A.C.J. dissenting) the appeal of the respondents from the judgment of Huggard C.J., dated April 2, 1935, was allowed with costs, and the order made by him was reversed. In the result, a writ of prohibition which had been directed to issue by the trial judge was set aside.

The appellants, the Estate and Trust Agencies (1927), Ld., are the owners of a house known as Municipal No. 543, North Bridge Road, Singapore. The respondents, the Singapore Improvement Trust, are a corporate body constituted by the Singapore Improvement Ordinance, 1927, and entrusted (by s. 4) with the duty of carrying out the provisions of that Ordinance.

The proceedings were commenced by the appellants by summons in the Supreme Court of the Straits Settlements (Settlement of Singapore) asking for the issue of a writ of prohibition directed to the respondents to prohibit them from further proceedings in respect of a declaration, made by the respondents on December 11, 1933, that a large block of 97 houses, including the appellants' said house, were insanitary within the meaning of s. 57 of the said Ordinance.

The Singapore Improvement Ordinance, 1927, is divided into Parts. Part V. (ss. 57 to 63 inclusive) deals with Insanitary

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(1) [1929] 1 K. B. 619.

(2) [1931] A. C. 494.

Buildings, and Part VI. (ss. 64 to 102) deals with Improvement Schemes. The following sections are very material: " 57. Whenever it appears to the Board that within its administrative area any building which is used or is intended or is likely to be used as a dwelling place is of such a construction or is in such a condition as to be unfit for human habitation, the Board may by resolution declare such building to be insanitary."

By s. 58, sub-s. 2 (as amended by the Singapore Improvement (Amendment) Act, No. 13 of 1930), it is provided that when a declaration under s. 57 has been made the owner of a building in respect of which a declaration has been made may within one month deliver to the Chairman an objection in writing to such declaration; and by s. 58, sub-s. 5, the objector shall be furnished with a statement in writing " of the grounds on which the Board made the declaration."

" 59.—(1.) After consideration of all objections the Board may revoke any declaration made under s. 57 or may submit it to the Governor in Council.

" (2.) Every declaration submitted under this section to the Governor in Council shall be accompanied by—

" (*a*) the reports, statements or matters upon which the Board acted;

" (*b*) such objections as have been made to the declaration;

" (*c*) any evidence which the objector may have produced before the Board;

" (*d*) a schedule showing the way in which the Board has dealt with each such objection.

" (3.) If no objection has been made to the declaration or if any objection made has been withdrawn, the Governor in Council shall approve the declaration.

" (4.) If any objection has been made and not withdrawn, the Governor in Council shall inform the objector and the Board of a time and place at which they may be heard.

" (5.) At such hearing the Board may appear by one of its officers or by an advocate and solicitor of the Supreme Court and the objector may appear as provided in s. 58, sub-s. 4.

" (6.) Each party may at the discretion of the Governor in Council adduce further evidence.

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"(7.) After hearing the parties, or such of them as may appear, the Governor in Council may make an Order approving or revoking the declaration."

Sect. 60 (as amended by s. 14 of the Singapore Improvement (Amendment) Ordinance, 1930)—

"60.—(1.) Every order made by the Governor in Council under sub-ss. 3 or 7 of s. 59 shall be notified. The Board shall thereupon cause a memorandum to be presented to the Registrar of Deeds containing a complete list of all the lands affected by such order, and the Registrar shall note in the register against all such lands the fact that such order has been made.

"(2.) Upon such note being made in the register all leases and all rights of occupancy under any tenancy in respect of the building to which the order relates shall forthwith determine without compensation from the Board or from any other person."

"Sect. 61.—(1.) At any time after the registration of an order declaring that a building is insanitary the Board may require the owner or reputed owner thereof by notice in writing to demolish the same within a period to be stated in the notice: provided that the Board shall make such arrangements as it considers necessary for the rehousing of any persons thereby dishoused and shall pay such persons such compensation for disturbance and transport as in its absolute discretion it thinks reasonable."

It should be observed that there is no provision for compensation as regards the demolition.

On December 11, 1933, the respondents caused to be served upon the appellants notice of a resolution passed by the respondents on November 22, 1933, under s. 57 of the Singapore Improvement Ordinance, 1927, whereby the respondents had declared the said house (among other houses) to be insanitary, and by the said notice it was stated that any objection to the said declaration should be delivered to the chairman of the respondents within one week from the service of the said notice.

The said house is a dwelling house, and is one of a block of

94 such houses situate in an area bounded by Victoria Street, Bugis Street, Rochore Road and North Bridge Road, within the jurisdiction of the respondents and, as stated above, is known as Municipal No. 543, North Bridge Road. The said resolution applied to all of the said 94 houses.

It may be mentioned that in the year 1928 the respondents had formulated a scheme under Part VI. of the said Ordinance for the improvement of that area of Singapore which comprises the said 94 houses. This scheme, however, was deemed to be rejected after objections by certain owners of property affected had been heard by the Governor in Council. One of the main objects of that scheme was to secure the demolition of the houses in the said block of 94 houses, including the appellants' house.

On December 27, 1933, the appellants, by their solicitors, duly objected in writing to the declaration, and requested to be supplied by the respondents with a statement in writing of the grounds upon which the respondents had made the said declaration.

On January 3, 1934, the respondents, by their secretary, acknowledged the appellants' objection and furnished the appellants with a copy of the report of Dr. Dawson, the Acting Municipal Health Officer, on the house, stating the grounds upon which the house was declared to be insanitary.

The report was in these terms :—

" Insanitary condition of No. 543, North Bridge Road.

" This is a two-storeyed brick and tile building, back to back with Nos. 59 and 60, Malabar Street.

" It is 13 feet in width and 135 feet in depth.

" It has two airwells adjoining a centre party wall of dimensions 12 feet by 8 feet. There is also an open area of dimensions 14½ feet by 10 feet.

" At the rear of the building a brick latrine kitchen and bathroom are situated, a corrugated iron bathroom is situated near the airwell on the first floor.

" The ceiling of the first floor front is 10 feet in height, above which there is an attic under the roof.

" The light is good only in that portion of the building which faces North Bridge Road.

" Ventilation is bad, there being no through current of air and no possibility of obtaining it.

" Drainage is through the house by means of a loose plank covered drain.

" Refuse and nightsoil have to be carried through the house for disposal.

" It is impossible for a water carriage sewage system to be installed."

W. Dawson,
" Ag. Health Officer."
28.9.33.

On February 21 and 22, 1934, the respondents heard objections to the declaration. The appellants, who were represented by counsel, called expert evidence to prove that the appellants' house was not unfit for human habitation. The respondents called no evidence. At the conclusion of the arguments Mr. William Bartley, the chairman of the respondents, announced that consideration of the matter would be postponed until another day.

Without giving any further notice of their intention in that behalf, by letter dated June 5, 1934, the respondents informed the appellants' solicitors that on May 22, 1934, the declaration had been submitted by the respondents to the Governor in Council in accordance with the provisions of s. 59 of the Ordinance. On the following day notice was given by the appellants to the respondents that application would be made for a writ of prohibition against the respondents; and subsequently an originating summons was issued asking for a writ of prohibition prohibiting the respondents from proceeding further in respect of the declaration in question. The grounds mentioned in the summons, which was issued pursuant to an order of the Court made on the originating summons, included (amongst others) the ground that the respondents had acted ultra vires in making the declaration.

Affidavits were filed both by the appellants and the respondents. In particular Mr. William Bartley, the chairman of

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the respondents, caused to be filed on their behalf an affidavit sworn by him on January 12, 1935, containing some statements which call for serious attention, namely, the following paragraphs :—

" 4. With reference to paragraph 5 of the said affidavit of the said James William Wotherspoon and the letter from the Secretary of the Board to Messrs. Donaldson and Burkinshaw and Rodyk and Davidson therein set out, I say that the grounds on which the Board declared the said house and premises to be insanitary were not confined to consideration of the report of the Acting Municipal Health Officer, portions whereof are set out in the said affidavit. In addition thereto the Board had visited the said premises and had personal knowledge and experience of the condition thereof. As a result of the reports of Dr. Dawson and of the knowledge and information available to the Board, it appeared to the Board that such premises were in such condition as to be unfit for human habitation.

" 9. I ask leave to refer to the Manual on Unfit Houses and Unhealthy Areas issued officially by the Ministry of Health for official use and particularly to Volume I, second part, chapter 5, under heading ' Standards of Fitness,' a copy of which is now produced and shown to me marked ' W.B. No. 3.' The first paragraph of chapter 5 of that official publication reads as follows :—

" Conditions to fit houses.

" 1. In this chapter a standard of fitness is indicated which should be regarded as the minimum in connection with existing houses. It is not suggested that the full and universal enforcement of the standard is immediately practicable at the present time. On this point reference should be made to what is said in Chapter II, page 7, as to the temporary acceptance in some cases of lower standards. Nor is it suggested that a house which is deficient in respect of one or more of the matters mentioned would necessarily be in a state which would justify the making of a closing order. From this point of view it will be observed that the matters mentioned are of varying importance, those mentioned in the earlier paragraphs

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being generally the more essential. It will be obvious, of course, that the seriousness of any particular defect may be much greater if that defect is accompanied by others.

" A fit house should be :—

" (1) free from serious dampness.

" (2) satisfactorily lighted and ventilated.

" (3) properly drained and provided with adequate sanitary conveniences, and with a sink and suitable arrangements for disposing of slop water, and

" (4) in good general repair ;

and should have

" (5) a satisfactory water supply.

" (6) adequate washing accommodation.

" (7) adequate facilities for preparing and cooking food ; and

" (8) a well-ventilated store for food.

" 10. Accordingly the Board as a whole inspected and examined on the 12th day of March, 1934, the said premises and the construction and condition thereof. Upon such inspection the Board took with them the detailed evidence and objections given and raised by the objectors' expert witnesses on behalf of the objectors and gave due consideration to all matters pointed out on behalf of the objectors by such expert witnesses. Such inspection was of great importance and largely influenced the Board in its subsequent decisions upon the objections. Two members of the Board were absent when the Board made the inspection, but they subsequently informed the Board that they had each made a visit individually.

" 13. In considering the standard of fitness for habitation the Board acted on the standard of fitness laid down in the Official Manual of Unfit Houses by the Ministry of Health mentioned in paragraph 9 hereof, except that they eliminated from that standard two conditions, namely, (1.) free from serious dampness, and (5.) satisfactory water supply."

The application for the writ of prohibition was heard at length before Huggard C.J., and he delivered his reserved judgment on April 2, 1935. (1)

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(1) [1935] S. S. L. R. 420.

In a learned and very careful judgment the Chief Justice held that the respondents having a duty to exercise functions of a judicial or quasi-judicial character, were amenable to a writ of prohibition, and that as there was still something left to be done by them they were not functus officio; that the respondents had taken into account matters other than the condition and construction of the appellants' individual house, and that the action of the respondents was therefore ultra vires; that the respondents had taken into consideration matters outside s. 57 and outside the Municipal Health Officer's report, and that s. 57 applied only to a building unfit in itself by reason of its construction or condition; and he ordered a writ of prohibition to issue. He also expressed his opinion on other points which, in the view their Lordships take, need not be mentioned here.

The appeal of the respondents was heard before the Court of Appeal of the Straits Settlements (Settlement of Singapore) composed of Burton A.C.J., Thomas C.J., Federated Malay States, and Terrell J., of whom Thomas C.J. and Terrell J. allowed the appeal, Burton A.C.J. dissenting.

On the appeal, as before the trial judge, a number of points were argued in addition to those above specifically mentioned. The judges seem to have agreed that at the hearing of the objections taken by the appellants the respondents were acting quasi-judicially. On the other material points they were not agreed. Thomas C.J. and Terrell J., however, concurred in holding that after the declaration was submitted to the Governor in Council the respondents had no more to do as regards their judicial functions and were a body functus officio, with the result that the application for prohibition was made too late, and they also concurred in thinking that the respondents did not take into consideration any extraneous matter or depart from the powers conferred on them by s. 57.

On the other hand Burton A.C.J. held that there had been no proper statement in writing of the grounds for the declaration, and that no question of waiver of this objection arose. Further, he held that, since the respondents would have the duty of carrying out the declaration if it were approved by the Governor in Council, it was not too late to issue a writ of prohibition. He was, therefore, in favour of dismissing the appeal. In these circumstances the case comes before their Lordships.

Their Lordships think it right in the first place to state that they have no doubt that the respondents have throughout acted with complete good faith and with an earnest desire to improve the housing accommodation of the Town and Island of Singapore. Their powers, however, are strictly limited by the terms of the Ordinance. Within those powers they can determine questions gravely affecting the property and rights of the inhabitants, but if they step in any degree beyond the limits imposed, any person aggrieved is at liberty to invoke the assistance of the law. The Ordinance in many respects, and in particular in Part V., encroaches on the rights of the subject. If a building is demolished as the result of a declaration under s. 57 the owner can receive no compensation. There can be no doubt that the Ordinance in this, and also in some other parts of it, must be strictly construed.

The next point to be dealt with is as to the position occupied by the respondents under ss. 57, 58 and 59 of the Ordinance. The procedure under those sections as pointed out by Terrell J. may be conveniently divided into three stages, i.e. :—

First stage.—The consideration of the Municipal Health Officer's report resulting in a declaration under s. 57.

Second stage.—The hearing of objections by the owners, and the decision of the Board to refer the matter to the Governor in Council.

Third stage.—The consideration of the matter by the Governor in Council, at which the parties may be represented and further evidence adduced. This stage results in the Governor in Council making an order either approving or revoking the declaration.

It does not seem necessary to decide whether the respondents were acting in a ministerial or a judicial capacity in the

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first of these stages, for it is not in dispute that in the second stage, that is, in deciding whether, after considering the objections raised against the declaration being a true and fair representation of the construction and condition of the dwelling (including, no doubt, the question whether alleged defects are not capable of being easily remedied), the declaration should be revoked or submitted to the Governor in Council, the respondents must be regarded as exercising quasi-judicial functions. A number of English authorities were referred to on this point, but it does not seem necessary to refer to them in detail, for the point has been in effect conceded, and the judges in Singapore seem (rightly in the opinion of their Lordships) to have treated it as reasonably clear. Some observations made by Greer L.J. in *Errington* v. *Minister of Health* (1), are pertinent and applicable.

The circumstances of the present case must now be examined. It is at once admitted that the powers of the respondents are derived entirely from s. 57 of the Ordinance. The respondents had to come to the conclusion, of course in good faith, that the building in question, namely the dwelling house, No. 543, North Bridge Road, was of such a construction or was in such a condition as to be unfit for human habitation. The expression, as was pointed out by Lord Dunedin in *Hall* v. *Manchester Corporation* (2), is a very strong one and vastly different from " not up to modern or model requirements."

If the report of the Health Officer with its ten statements is regarded, as their Lordships think it must be regarded, as the main ground upon which the respondents made their declaration, there is strong reason for thinking that the statements on the face of them appear to be directed to a complaint other than that of fitness for human habitation. The first five statements relate to construction, and it cannot be contended that, applying the standards of housing of Singapore or, for that matter, of England, they suggest anything more or worse than a small and perhaps a mean dwelling. In the first statement the words " back to back " are admitted to be inaccurate; they are in fact corrected by the statement that there is an open area 14½ feet by 10 feet at the rear of the house. Then come two statements as to light and as to ventilation. A house with rooms in it which are badly lighted or ill-ventilated cannot be held to be unfit for human habitation without condemning an enormous number of houses, including, if an illustration from London is permissible, many of the older houses of the rich in Mayfair. The truth is, as was in effect pointed out by Lord Dunedin and by Lord Parker in *Hall* v. *Manchester Corporation* (1), that when a house is stated to be unfit for human habitation it is the whole house that is being so described. In the portion of No. 543 that faces North Bridge Road the light is stated to be good; and the same portion is apparently well ventilated. It cannot be suggested that a room with adequate windows must be ill-ventilated unless it has also a through current of air. The most that is suggested by these two "grounds" is that the back portion of the house may be unhealthy to live in for prolonged periods. The next statement as to drainage must be qualified by stating that it refers to sink-water. If a loose plank covering is insanitary a small expenditure could probably put this right. The last grounds refer to a mere question of convenience, and suggest that the Health Officer would prefer a water carriage system, a very intelligible preference, but one which has little bearing on the question whether human beings cannot occupy the house without any real injury to health.

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(1) [1935] 1 K. B. 249, 259.

(2) 113 L. T. Rep. 465, 468.

Their Lordships are not disposed to look upon these so-called grounds as if they were pleadings in an action which could be challenged by a species of demurrer. It seems to them that the Ordinance requires no more than a fair statement of all the matters which the Board relies on and which the proprietors must be prepared to discuss on the inquiry which must take place before the declaration is submitted to the Governor in Council. Their Lordships would therefore have hesitated to act on the strong suspicion which an attentive consideration of the report has aroused in their minds, namely,

(1) 113 L. T. Rep. 465.

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that the respondents were applying a very different test from that which was open to them under the section ; but, as it happens, the affidavit which the chairman of the respondents made with great fairness and candour has relieved them of any difficulty on this head. It is manifest from the paragraphs of that affidavit which are above set out that the respondents in fact were considering, with slight modifications, a standard suggested by a Ministry of Health in England for a very different purpose. The Manual, which has of course no statutory authority, is concerned merely to indicate the view of the Ministry as to a desirable standard of fitness for houses in England and Wales, presumably in towns, and under conditions which are widely different from those of a great Eastern city. Apart however from this, the Manual itself is not dealing with the standard to be applied in considering whether houses can be held to be unfit for human habitation. It will be noted that there is not one of the matters referred to in the passages from the Manual referred to by Mr. Bartley which is not capable of remedy, and on the other hand, that there is not a single reference to those matters which generally render a house unfit for human habitation, such as a structure which is unsafe, a verminous condition of the materials, a pestiferous atmosphere, a state of things dangerous to health, or such a rotten or decayed condition of the building that rebuilding will be cheaper than extensive repair. Their Lordships are not attempting to define the facts or circumstances which render a building unfit for human habitation ; they are merely giving reasons for thinking that the defects pointed out in the manual—defects which, in fact, exist in country cottages all over the world, and in a vast number of old towns—do not purport to afford a guide on the particular question with which the respondents had to deal. Moreover, it should be noted that the effect of a closing order under s. 11 of the Housing Act, 1925, is very different from that of a declaration under the Ordinance approved by the Governor in Council ; the provisions of s. 14 of the Act are not to be found in the Ordinance. Instead of the owner having not less than four months to remedy the defects of the house, a further hearing before the local authority, with a right of appeal to the Minister, under the Ordinance the Board may require the owner to demolish his house, if the Governor in Council has approved the declaration, without any further hearing, and without affording the owner any opportunity of executing the works necessary to render the house fit for human habitation.

To sum up this part of the case, their Lordships have come to the conclusion that the "grounds" on which the respondents made the declaration, as explained by the affidavit of their chairman, were grounds which did not justify the declaration. In other words, the respondents were applying a wrong and an inadmissible test in making the declaration and in deciding to submit it to the Governor in Council. They were therefore acting beyond their powers, and the declaration is not enforceable.

On this view of the merits of the case there remains a question of difficulty to be decided, not the less important because it is one of a purely technical character. The originating summons as framed is limited to a claim that a writ of prohibition may issue against the respondents. The Governor in Council is no party to the proceedings, and there is no claim founded on certiorari. The respondents have thus been enabled to argue that as a Board they are functus officio; that there is nothing left to be done by them as a quasi-judicial body, nothing on which the writ of prohibition could operate; and that the application, not having been made before the declaration was submitted to the Governor in Council, is too late. It is not in dispute that the fact that the declaration has been submitted to the Governor in Council is in itself no reason against the issue of the writ. A proceeding is none the less a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval by some other authority: see *Rex* v. *Electricity Commissioners* (1) and cases there referred to.

On the other hand, there must remain something to which prohibition can apply, some act which the respondents if not prohibited may do in excess of their jurisdiction, including

(1) [1924] 1 K. B. 171.

any act, not merely ministerial, which may be done by them in carrying into effect any quasi-judicial order which they have wrongly made. Their Lordships do not doubt the correctness of the view expressed by R. S. Wright J. in *In re The London Scottish Permanent Building Society* (1)—namely, that (2) "an application for prohibition is never too late so long as there is something left for it to operate upon." In *Rex* v. *North. Ex parte Oakey* (3) Scrutton L. J., after expressly approving this dictum as that of a judge who had great familiarity with this subject, remarked (4): "When the sentence is unexecuted a statement of intention to execute it may be followed by a writ of prohibition, however long a time may have elapsed since the original sentence was pronounced." It is not immaterial in this connection to observe, since the writ of prohibition is a matter of discretion, that the respondents gave the appellants no opportunity of applying for prohibition or certiorari before they sent the declaration to the Governor in Council.

In the present case there are three duties with which the respondents may still be charged. In the first place, under s. 59, sub-s. 5, they may appear at the hearing before the Governor in Council by one of their officers or by an advocate and solicitor of the Supreme Court. In the second place, if the declaration is approved, the respondents under s. 60, sub-s. 1, must cause the order approving the declaration to be presented for registration under Ordinance No. 148. In the third place, under s. 61, sub-s. 1, at any time after the registration of the order, "the Board may require the owner . . . by notice in writing to demolish [the building] within a period to be stated in the notice."

Their Lordships are not disposed to think that the Court in its discretion would order prohibition to issue in relation to the first matter. The Governor in Council could proceed with his inquiry without the assistance of the respondents, and the prohibition as to that appearance might be of a futile character. There might also be serious difficulties in ordering the writ

(1) (1893) 63 L. J. (Q. B.) 112.
(2) Ibid. 113.
(3) [1927] 1 K. B. 491.
(4) Ibid. 503.

to issue merely in regard to the registration. Their Lordships do not think it necessary to express a final opinion as to this, for, in their view, the functions which the respondents have to perform under s. 61 are free from those difficulties. Plainly the power which they have under that section is of a discretionary character, and the Governor in Council has nothing to do with the exercise of that discretion. Nor will the respondents under s. 61 be carrying out the order of the Governor in Council, which can do no more than approve the declaration. There is no reason for thinking that the actions of the respondents under that section are to be treated as altogether severed from their actions under s. 57. The more correct view would seem to be that in requiring the demolition they would in truth be carrying into effect their original declaration, which indeed required the approval of an independent authority, but which, that approval having been obtained, was left to the respondents to carry out according to their discretion. It must not be forgotten in considering the technical aspect of the case that, on the conclusion at which their Lordships arrived, the declaration was ultra vires, and that if the respondents were to attempt to exercise their powers under s. 61 they would be relying on an order which, if challenged in time by suitable proceedings, could not have been made.

On the whole, and on careful consideration of the four learned judgments and some able arguments, their Lordships must agree with the conclusions of the Chief Justice of the Straits Settlements, and of Burton A.C.J. The order of the former must be restored, and the appeal must be allowed, with costs here and below.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Whites & Co.*
Solicitors for respondents: *Peacock & Goddard.*

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—— *Moss' Empires, Ld.* v. *Inland Revenue Commissioners* 1936 S. C. 531.
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2. —— *Railway—Bridge—Upper deck for railway—Lower deck for vehicles and foot passengers — Railway hereditament — Newcastle-upon-Tyne and Berwick Railway Act,* 1845 (8 *&* 9 *Vict. c. clxiii.*), *s.* 23—*Railways (Valuation for Rating) Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 24), *s.* 1, *sub-s.* 3.

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REVENUE—*Estate duty—Property passing on death—Shares in company—Restrictions on alienation and transfer—Value of property—Sale "in open market"—Trust companies—Special demand—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7, *sub-s.* 5.

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3. —— *Estate Duty — Settled estate — Discretionary trusts in favour of a class—Change in members of class—New class—Death of beneficiary—Property " passing " or " deemed to pass "—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 7.

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4. —— *Estate duty—Settlement — Tenant for life in possession—Purchase of contingent reversionary life estate—Settlement on discretionary trusts—Falling into possession of reversionary life estate—Death of tenant for life in possession—Passing of property to beneficiary under discretionary trust—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1.

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5. —— *Income tax — Agency business — Acquired by assignment—Subject to liability under existing agreements to pay percentage of commission to third parties—Payment not expenditure incurred solely for the purpose of earning profits—Not deductible in computing profits and gains—Obligation undertaken in consideration of acquisition of right to earn profits—Indian Income-tax Act* (*XI. of* 1922), *s.* 10, *sub-s.* 2 (*ix.*).

Judgment of the High Court affirmed. Tata Hydro-Electric Agencies, Bombay *v.* Income-tax Commissioner, Bombay Presidency and Aden - - **J. C. 685**

6. —— *Income tax—Guarantee by one company to make up deficiency in fixed dividend payable by another company—Payments under guarantee—Whether " annual payments "—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case III, r.* 1 (*a*), *and All Schedules Rules, r.* 21—*Finance Act*, 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 26.

Decision of the First Division of the Court of Session (reported 1936 S. C. 531) affirmed. Moss' Empires, Ld. *v.* Inland Revenue Commissioners - - - **H. L. (Sc.) 785**

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7. —— *Income Tax—Profits and gains—Builders' business—Purchase of land—Sale of land and houses built thereon—Consideration consisting of money and ground annuals—Value of ground annuals to be included in profits and gains—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D.*

Interlocutor of the Court of Session, 1935 S. C. 802, affirmed. John Emery and Sons *v.* Inland Revenue Commissioners **H. L. (Sc.) 91**

8. —— *Income Tax—Profits arising from employment — Employment wholly outside United Kingdom—Employee resident in United Kingdom—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 1; *r.* 18, *sub-s.* 5—*Finance Act*, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 18, *sub-s.* 1.

Order of the Court of Appeal [1936] 1 K. B. 1, affirmed. G. W. Eaton-Turner v. T. McKenna - - - - **H. L. (E.) 162**

9. —— *Income Tax—Profits of trade—Deductions—Sums deposited with Building Society by Builder—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

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10. —— *Income Tax—Railway Company —Additional capital—Debenture stock—Interest temporarily chargeable and charged to capital account—Right of company to retain tax on payment of interest—Profits and gains brought into charge to tax—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *General Rules Applicable to All Schedules, r.* 19, *sub-s.* 1, *r.* 21.

Orders of the Court of Appeal affirmed. Central London Ry. Co. *v.* Inland Revenue Commissioners. London Electric Ry. Co. *v.* Same. Metropolitan Ry. Co. *v.* Same - - - **H. L. (E.) 77**

11. —— *Income Tax—Trading receipts—" Advances "—British Sugar Industry* (*Assistance*) *Act*, 1931 (21 *&* 22 *Geo.* 5, *c.* 35), *s.* 1—*Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

Order of the Court of Appeal affirmed. Lincolnshire Sugar Co. *v.* Smart **H. L. (E.) 697**

RULES AND REGULATIONS:—

—— Rules of Supreme Court, Order xiii., r. 10; Order xxvii., r. 15: Evans *v.* Bartlam - **H. L. (E.) 473**

—— Various Industries (Silicosis) Scheme, 1931 (S. R. & O. 1931, No. 342), para. 2: Wragg *v.* Samuel Fox & Co. Charlesworth *v.* Same **H. L. (E.) 442**

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—— Various Industries (Silicosis) Amendment Scheme, 1934 (S. R. & O. 1934, No. 1155): Wragg *v.* Samuel Fox & Co. Charlesworth *v.* Same - - **H. L. (E.) 442**

SEPARATION DEED—Covenant to pay weekly sum to wife "during her life"—Not determined on death of husband - - - - **491**
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2. —— Canadian — Constitutional validity.
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STATUTES :—
I. Imperial.

1845.

8 & 9 Vict. c. clxiii. (Newcastle-upon-Tyne and Berwick Railway), s. 23: Newcastle-upon-Tyne Corporation and Gateshead Corporation *v.* Railway Assessment Authority and L. & N. E. Ry. Co. **H. L. (E.) 275**

1867.

30 & 31 Vict. c. 3 (British North America), ss. 91; 92 (13); 132: Attorney-General for Canada *v.* Attorney-General for Ontario **J. C. 326**

—— —— s. 91 (2), (27): Attorney-General for British Columbia *v.* Attorney-General for Canada **J. C. 368**

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—— —— s. 91 (3), (8); s. 92 (2): Forbes *v.* Attorney-General for Manitoba - - - **J. C. 260**

—— —— s. 91 (21); s. 92 (13), (16): Attorney-General for British Columbia *v.* Attorney-General for Canada - - - **J. C. 391**

—— —— s. 92 (13): Attorney-General for Canada *v.* Attorney-General for Ontario - - **J. C. 355**

1889.

52 & 53 Vict. c. 49 (Arbitration): R. & W. Paul, Ld. *v.* The Wheat Commission - - - **H. L. (E.) 139**

1893.

56 & 57 Vict. c. 61 (Public Authorities Protection): R. & W. Paul, Ld. *v.* The Wheat Commission **H. L. (E.) 139**

1894.

57 & 58 Vict. c. 30 (Finance), s. 1: Sir S. E. Scott, Bt., and Coutts & Co. *v.* Inland Revenue Commissioners - - **H. L. (E.) 174**

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1911.

1 & 2 Geo. 5, c. 46 (Copyright), s. 25, sub-ss. 1, 2: Mansell *v.* Star Printing and Publishing Co. of Toronto - - - **J. C. 872**

1915.

5 & 6 Geo. 5, c. 61 (Government of India): R. Venkata Rao *v.* Secretary of State for India - - **J. C. 248**

1916.

6 & 7 Geo. 5, c. 37 (Government of India (Amendment)): R. Venkata Rao *v.* Secretary of State for India **J. C. 248**

—— —— c. 50 (Larceny), s. 29, sub-s. 1 (i.): Thorne *v.* Motor Trade Association - - **H. L. (E.) 797**

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8 & 9 Geo. 5, c. 40 (Income Tax), Sch. D: JOHN EMERY AND SONS *v.* INLAND REVENUE COMMISSIONERS **H. L. (Sc.) 91**

—— —— Sch. D., Case I: HARRISON *v.* JOHN CRONK & SONS, LD. **H. L. (E.) 185**

—— —— Sch. D, Case I.: LINCOLNSHIRE SUGAR CO. *v.* SMART **H. L. (E.) 697**

—— —— Sch. D, Case III., r. 1 (*a*), and All Schedules Rules, r. 21: MOSS' EMPIRES, LD. *v.* INLAND REVENUE COMMISSIONERS - **H. L. (Sc.) 785**

—— —— Sch. E., r. 1; r. 18, sub-s. 5: G. W. EATON - TURNER *v.* T. MCKENNA - - **H. L. (E.) 162**

—— —— —— General Rules Applicable to All Schedules, r. 19, sub-s. 1, r. 21: CENTRAL LONDON RY. CO. *v.* INLAND REVENUE COMMISSIONERS. LONDON ELECTRIC RY. CO. *v.* SAME. METROPOLITAN RY. CO. *v.* SAME **H. L. (E.) 77**

1919.

9 & 10 Geo. 5, c. 101 (Government of India): R. VENKATA RAO *v.* SECRETARY OF STATE FOR INDIA - **J. C. 248**

1920.

10 & 11 Geo. 5, c. 67 (Government of Ireland), s. 4: GALLAGHER *v.* LYNN **H. L. (N. I.) 863**

1922.

12 & 13 Geo. 5, c. 17 (Finance), s. 18, sub-s. 1: G. W. EATON-TURNER *v.* T. MCKENNA - - **H. L. (E.) 162**

1925.

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15 & 16 Geo. 5, c. 84 (Workmen's Compensation), s. 1: ALDERMAN *v.* GREAT WESTERN RY. CO. **H. L. (E.) 454**

—— —— —— s. 1, sub-ss. 1, 2: KNOWLES *v.* SOUTHERN RY. CO. **H. L. (E.) 463**

—— —— —— ss. 1, 43, sub-s. 1; Sch. 3; RICHARDS *v.* GOSKAR **H. L. (E.) 304**

—— —— —— s. 47: WRAGG *v.* SAMUEL FOX & CO. CHARLESWORTH *v.* SAME **H. L. (E.) 442**

—— —— c. 90 (Rating and Valuation), s. 24, sub-s. 1, and Third Sch.: TOWNLEY MILL CO. (1919) *v.* OLDHAM ASSESSMENT COMMITTEE **H. L. (E.) 419**

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1927.

17 & 18 Geo. 5, c. 10 (Finance), s. 26 MOSS' EMPIRES, LD. *v.* INLAND REVENUE COMMISSIONERS **H. L. (Sc.) 785**

1929.

Reprint of Government of India Act, s. 96B, sub-ss. 1, 2, 3, 4 and 5 R. VENKATA RAO *v.* SECRETARY OF STATE FOR INDIA - - **J. C. 248**

19 & 20 Geo. 5, c. 23 (Companies), s. 55: CARRUTH *v.* IMPERIAL CHEMICAL INDUSTRIES, LD. - **H. L. (E.) 707**

1930.

20 & 21 Geo. 5, c. 24 (Railways (Valuation for Rating)), s. 1, sub-s. 3: NEWCASTLE-UPON-TYNE CORPORATION AND GATESHEAD CORPORATION *v.* RAILWAY ASSESSMENT AUTHORITY AND L. & N. E. RY. CO. **H. L. (E.) 275**

—— —— c. 43 (Road Traffic), s. 11: ANDREWS *v.* DIRECTOR OF PUBLIC PROSECUTIONS - **H. L. (E.) 576**

—— —— s. 36, sub-s. 1: IZZARD *v.* UNIVERSAL INSURANCE CO. **H. L. (E.) 773**

1931.

21 & 22 Geo. 5, c. 35 (British Sugar Industry (Assistance)), s. 1: LINCOLNSHIRE SUGAR CO. *v.* SMART **H. L. (E.) 697**

—— —— c. 42 (Agricultural Marketing): FERRIER *v.* THE SCOTTISH MILK MARKETING BOARD **H. L. (Sc.) 126**

1932.

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1934.

24 & 25 Geo. 5, c. 41 (Law Reform (Miscellaneous Provisions)), s. 1: ROSE *v.* FORD - - **H. L. (E.) 826**

—— —— c. 50 (Road Traffic), s. 34: ANDREWS *v.* DIRECTOR OF PUBLIC PROSECUTIONS - **H. L. (E.) 576**

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1904-1923.

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CANADA.

(Quebec) Civil Code, arts. 443, 447-451, 981 (*a*)—(*n*): LAVERDURE *v.* DU TREMBLAY - - - **J. C. 666**

1888.

42 & 43 Vict. c. 29, art. 5803, ss. 1-14, which added art. 981 (*a*)—(*n*) to the Civil Code of Quebec: LAVERDURE *v.* DU TREMBLAY - - **J. C. 666**

1906.

R. S. C., 1906, c. 70 (Canadian Copyright), s. 6: MANSELL *v.* STAR PRINTING AND PUBLISHING CO. OF TORONTO **J. C. 872**

1921.

10 & 11 Geo. 5, c. 24 (Canadian Copyright) (now R. S. C., 1927, c. 32): MANSELL *v.* STAR PRINTING AND PUBLISHING CO. OF TORONTO - **J. C. 872**

1927.

R. S. C., 1927, c. 32 (Canadian Copyright), s. 42, sub-ss. 1, 2, 5; ss. 45, 47; and First Schedule: MANSELL *v.* STAR PRINTING AND PUBLISHING CO. OF TORONTO - **J. C. 872**

R. S. of New Brunswick, c. 127 (Public Utilities), ss. 10, 14, 15, 16, 18 and 19: MARITIME ELECTRIC CO. *v.* GENERAL DAIRIES, LD. **J. C. 610**

1933.

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1935.

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—— —— c. 38, St. Can. (Employment and Social Insurance): ATTORNEY-GENERAL FOR CANADA *v.* ATTORNEY-GENERAL FOR ONTARIO **J. C. 355**

—— —— c. 44, St. Can. (Minimum Wages): ATTORNEY-GENERAL FOR CANADA *v.* ATTORNEY-GENERAL FOR ONTARIO - - - **J. C. 326**

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—— —— c. 59, St. Can. (Dominion Trade and Industry Commission), s. 2 (*h*); s. 15, sub-s. 2, to s. 26: ATTORNEY-GENERAL FOR ONTARIO *v.* ATTORNEY-GENERAL FOR CANADA **J. C. 405**

—— —— c. 63, St. Can. (Limitation of Hours of Work): ATTORNEY-GENERAL FOR CANADA *v.* ATTORNEY-GENERAL FOR ONTARIO **J. C. 326**

—— —— c. 64, St. Can. (Natural Products Marketing Act Amendment): ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* ATTORNEY-GENERAL FOR CANADA **J. C. 377**

CEYLON.

1895.

No. 14 of 1895 (Evidence Ordinance), s. 32: CHANDRASEKERA ALIAS ALISANDIRI *v.* THE KING - **J. C. 220**

1918.

No. 2 of 1918 (Money Lending Ordinance), ss. 2, 8, 10, 13 and 14: M. A. L. M. SOCKALINGAM CHETTIAR *v.* D. P. RAMANAYAKE - - **J. C. 230**

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1876.

No. 8 of 1876 (Public Lands Ordinance): JAMES JACKSON *v.* J. M. COOKE **J. C. 205**

1929.

No. 17 of 1929 (Public Lands Amendment Ordinance), s. 2: JAMES JACKSON *v.* J. M. COOKE - - **J. C. 205**

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Hong Kong.

1932.

No. 3 of 1932 (Estate Duty Ordinance), ss. 4, 5, sub-s. 1 (*a*), (*b*); s. 9, sub-s. 6 (*a*), (*b*); s. 25, sub-ss. 1, 2: Armstrong *v.* Estate Duty Commissioner - - **J. C. 885**

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1922.

Act XI. of 1922 (Indian Income-tax), s. 10, sub-s. 2 (ix.): Tata Hydro-Electric Agencies, Bombay *v.* Income-tax Commissioner, Bombay Presidency and Aden **J. C. 685**

New Zealand.

1874.

No. 84 of 1874 (Real Estate Descent), ss. 3, 18: Macleay *v.* Treadwell **J. C. 626**

1879.

No. 49 of 1879 (Administration), ss. 6, 10, sub-ss. 1, 2, 5: Macleay *v.* Treadwell - - - - **J. C. 626**

1908.

No. 3 of 1908 (Administration), ss. 4, 11: Macleay *v.* Treadwell - **J. C. 626**

1913.

No. 30 of 1913 (Local Bodies Loans), s. 29, sub-s. 1; ss. 32, 33, 42: Auckland Corporation *v.* Alliance Assurance Co. - **J. C. 587**

1925.

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Straits Settlements (Singapore).

1927.

No. 10 of 1927 (Singapore Improvement Ordinance), ss. 4, 57, 58, 59, 60, 61: Estate and Trust Agencies (1927), Ld. *v.* Singapore Improvement Trust - - - **J. C. 898**

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TRADE MARK—National—Civil right of novel character - - **405**
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TRADE UNION—*Association of motor manufacturers—Prohibition of sales at other than list prices—Enforcement of rule by Stop List unless a money payment made—Whether demand for payment as an alternative to placing person on Stop List a demand with " menaces " without reasonable or probable cause—Larceny Act,* 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 29, *sub-s.* 1 (*i*).

Decision of Court of Appeal affirmed. Thorne *v.* Motor Trade Association **H. L. (E.) 797**

TRADING RECEIPTS—" Advances " under British Sugar Industry (Assistance) Act, 1931—Liability to tax - **697**
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TREATY OF VERSAILLES—Legislation passed in performance of obligations under - - - - **326**
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WEST AFRICA—*Gold Coast—Jurisdiction—Proposed acquisition of land for public service—Notice—Questions of disputed title—Compensation—To be determined by Divisional Court—Proceedings in Native Tribunal—Misconceived—Public Lands Ordinance, No.* 8 *of* 1876—*Public Lands Ordinance, c.* 142 *of the Laws of the Gold Coast Colony, ss.* 6, 7—*Public Lands Amendment Ordinance, No.* 17 *of* 1929, *s.* 2.

Decision of the West African Court of Appeal affirmed. JAMES JACKSON *v.* J. M. COOKE - - - - - - **J. C. 205**

WHEAT COMMISSION—*Quota payment—Money paid under protest—Claim to recover—Flour—Wheat Offals—By-law—Validity—Ultra vires—Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49)—*Public Authorities Protection Act,* 1893 (56 & 57 *Vict. c.* 61)—*Wheat Act,* 1932 (22 & 23 *Geo.* 5, *c.* 24), *s.* 3, *sub-s.* 1; *s.* 5, *sub-ss.* 1, 2; *s.* 20, *sub-s.* 1.

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WORDS :—

—— " Advances " made under Statute to beet sugar manufacturers—Liability to income tax : LINCOLNSHIRE SUGAR CO. *v.* SMART **H. L. (E.) 697**

—— " Annual payments " under guarantee—Chargeable to tax : MOSS' EMPIRES, LD. *v.* INLAND REVENUE COMMISSIONERS **H. L. (Sc.) 785**

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—— " Civil fruits " : *See* LAVERDURE *v.* DU TREMBLAY - - **J. C. 666**

—— " Direct taxation " : FORBES *v* ATTORNEY-GENERAL FOR MANITOBA **J. C. 260**

—— " Flour " : R. & W. PAUL, LD. *v.* THE WHEAT COMMISSION **H. L. (E.) 139**

—— " Ground Annual " : JOHN EMERY AND SONS *v.* INLAND REVENUE COMMISSIONERS - **H. L. (Sc.) 91**

—— " Heir-at-law " : *See* MACLEAY *v.* TREADWELL - - **J. C. 626**

—— " Middlings " : R. & W. PAUL, LD. *v.* THE WHEAT COMMISSION **H. L. (E.) 139**

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